154 US 247

TRANSCRIPT OF RECORD.

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901

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 335.

JOHN RIGGLES, MARY RIGGLES, MARY A. MILL[illegible], SARAH A. TURTON, GERTRUDE R. WILSON, ET AL., APPELLANTS,

vs.

HANNAH ERNEY AND CHARLES A. ERNEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 27, 1890.

(14,388.)

LAW ASSOCIATION OF PHILADELPHIA

(14,388.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 25, 1894.

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AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 23d day of October, 1890.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 23d day of Oct., 1890.

E. F. BINGHAM,
Chief Justice. [SEAL.]

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 23d day of October, 1890.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

[Endorsed:] Authentication of record.

1 *Original Bill. Filed Dec.* 27, 1884.

In the Supreme Court of the District of Columbia.

JOHN RIGGLES, MARY RIGGLES, MARY A. Miller, Sarah A. Turton, and Gertrude R. Wilson, Marion E. Evans, Mary Catharine Evans, and Mida R. Evans, by Their Father and Next Friend, George W. Evans; William Riggles, Samuel R. Riggles, and Mary Arnold, Frederick W. Riggles, and Samuel B. Riggles, by Their Mother and Next Friend, Anna M. Riggles, *vs.* HANNAH ERNEY and CHARLES A. ERNEY.	In Equity. No. 9258, Docket 24.

The complainants above named bring this their original bill of complaint against Hannah Erney and Charles A. Erney, her husband, and thereupon say:

1. The complainants John Riggles, Mary A. Miller, Sarah A. Turton, and the defendant Hannah Erney are the sole surviving children and devisees of Thomas Riggles, late of the District of
2 Columbia, deceased. The complainants Gertrude R. Wilson, Marion E. Evans, Mary Catharine Evans, and Mida R. Evans are the sole surviving children of Catharine V. Evans, a daughter of the said Thomas Riggles, also deceased. The three last named are infants and unite in this cause by their father and next friend, George W. Evans. The complainants William Riggles, Samuel R. Riggles, and Mary Arnold are children of William Riggles, a son of the said Thomas Riggles, also deceased. The complainants Frederick W. and Samuel B. Riggles are children of Thomas Riggles, Junior, also a son of said Thomas Riggles, and also deceased, and, being infants, unite in this cause by their mother and next friend, Anna M. Riggles. All of the said complainants and the said defendant are residents of the District of Columbia, and the complainants bring this suit in their own right.

2. The defendant Hannah Erney is sued in her own right and the said Charles A. Erney as *her* husband of said Hannah.

3. The said Thomas Riggles, ancestor of the complainants and the defendants, died in the District of Columbia about the year 18—, having first made and executed his last will and testa-
3 ment on the 30th day of October, in the year 1863, whereby he devised as follows:

"I will and devise that my house and premises which I now occupy, situated in the city of Washington in the District of Columbia, being lot numbered seven (7) and part of lot numbered eight (8) in square numbered one hundred and ninety-nine (199) together with all the household and kitchen furniture and other personal property that may be on said premises at the time of my decease

shall be and remain in the possession of my wife Catharine Riggles during her lifetime for the benefit of herself and our four children named Thomas, Catharine, Maria and Hannah Riggles, respectively; and after the death of my said wife, the said house and premises to remain in the hands of my executor hereinafter named, to be by him used for the benefit of the above-named four children until the youngest one of them surviving shall become twenty-one years of age; provided, that when the said Thomas shall arrive at twenty-one years of age, and when either of the said daughters shall be married, then, and in either such case, the benefit arising
4 from said property shall be exclusively for the use of such of said daughters as may then be unmarried; and after the death of my said wife, and the said youngest child shall attain the age of twenty-one years, then, the said house and premises I will and bequeath unto my son Thomas Riggles, with the express provision that such of my aforenamed daughters as may then be unmarried shall be taken care of by my said son Thomas; and in case the said Thomas Riggles shall depart this life before the said three sisters then the said house and premises to be sold, and the proceeds be divided equally among the said three sisters or the survivors of them. Item: I will and devise that all the lots of ground belonging to me situate in square numbered one hundred and seventy-nine (179) in said city of Washington which may remain unsold and disposed of by my said executor at such time and in such manner as his discretion may dictate as most for the advantage of my wife and children aforenamed, and the amounts that may be realized therefrom, after paying all necessary expenses of my wife and family, be by him invested at his discretion for the benefit of my said wife and four children or as many of them as shall
5 remain unmarried; and after the death of my said wife, and our four children shall have attained the age of twenty-one years if any of said property in square one hundred and seventy-nine remains unsold, and also any surplus that may then remain from the proceeds of said square one hundred and seventy-nine, to be divided between my other children, John, James and William Riggles, and my daughters, Mary Ann Miller and Sarah Turton; and it is farther my wish and desire that should the residue remaining from the sale of my lots in square one hundred and seventy-nine be more than the value of said house and premises I now occupy in square one hundred and ninety-nine, then, and in that case, I wish and devise that my son Thomas and my said daughters Catharine, Maria and Hannah Riggles shall receive from the proceeds of square one hundred and seventy-nine, such portion of such proceeds as make all their shares alike or equal to each other and to the shares of my other children."

4. Under and by virtue of the provisions and directions of the said last will and testament the executor thereof, the said
6 John B. Turton, did subdivide the said square 179 and make sale of portions of the same, and died leaving sublots numbered from 1 to 42 and from 61 to 80, inclusive, of the said subdivision of the said square unsold and subject to a certain deed of

trust executed by the said John B. Turton, as executor, to secure the repayment of certain moneys borrowed by him. The complainants aver and charge that the proceeds of sale so made by the said executor and the money borrowed upon the security of the said deed of trust were applied and appropriated to the support of the widow of the said testator and the four children named in the will, to wit, Thomas, Catharine, Maria, and Hannah, the latter being defendant herein, the said Catharine receiving such support only until her marriage, which happened during the said period.

5. About the early part of the year 1873 the said widow and the four children first named, Thomas, Maria, Catharine, and Hannah Riggles, desiring to have the property in square 179, which was unimproved and unproductive, sold for the purpose of a partial
7 division of the estate and for the payment of certain indebtedness which they had incurred, as well as of certain taxes and assessments upon the homestead which had accrued and were due and unpaid, it was proposed and agreed that notwithstanding the devise of the will the entire estate of the testator should be equally divided between the widow and children of the testator, and that the property in the square 179 (unimproved) should be at once sold for the payment of the incumbrances, taxes, and assessments upon the whole realty and of the indebtedness of the widow and the four children above named, and the division of the then nett proceeds of such sales between the widow and all the children, and that the homestead should be retained for the use and occupation of the widow and the said four children until her death and the death or marriage of the daughters, when the said homestead property should be sold and the proceeds be divided equally among all the children of the testator.

6. That, in pursuance of the said arrang-ments and by the
8 direction of all the said parties in interest, a deed was prepared and executed whereby the said parties conveyed to John Riggles and George W. Evans, their heirs or assigns, all of the remaining portion of the said square 179 in trust to sell and dispose of the said property, and of the proceeds of such sales, after payment of necessary costs, charges, and expenses in the premises, to pay and discharge all taxes and assessments due and unpaid upon the said lots in square 179, and also upon the property in square 199—the homestead—and after paying and discharging the liens, taxes, and assessments, &c., upon all of the said property, together with the costs, expenses, &c., to distribute whatever might from time to time remain of the proceeds of said sales among the said widow and children, heirs and devisees of the said Thomas Riggles, deceased, in equal proportions, share and share alike; that the said deed was made and executed by all of the parties, including the defendant Hannah Erney (who executed the said deed as Hannah Riggles), upon the distinct agreement and condition that whenever under the said will and testament the said property in
9 square 199 should be sold the proceeds of such sale should be applied and distributed in the same manner.

Reference is made to the record of the said deed in Liber No. 713, folio 475, of the land records of the District of Columbia, which is

prayed to be taken and considered as being here fully and at large set forth as a part of this bill of complaint.

7. Thereupon, by virtue of the said agreement and the said conveyance, the said grantees, George W. Evans and John Riggles, proceeded to sell the remaining portions of the said square 179 and did so from time to time, making sale of the same, and of the proceeds of such sales they paid and discharged the liens or incumbrances upon the said property, also the taxes and assessments due and unpaid at that time and portions accruing thereafter upon the said property in square 199, the homestead. They also from the said proceeds of sales paid and discharged the indebtedness which was contracted by the said widow, Catharine Riggles, and the four children, including the defendant Hannah Erney, who resided in the homestead, for their maintenance, and also advanced to
10 the said widow, Catharine Riggles, for the same purpose the further sum of $500, the said payment on account of the said homestead property and on account of the maintenance and sup-ort of the widow and the said four children, including the defendant Hannah Erney, amounting to nearly $3,000.

8. After the payment of the moneys as set forth in the last paragraph as being made from the said proceeds of sales the said trustee divided the remainder of such proceeds equally among all of the said parties, both the devisees of the property in square 179 and the devisees of the property in square 199, including in the latter the said defendant Hannah Erney, the share or portion so paid to each of the said devisees being over $3,000, that being also the portion paid to and received by the said defendant Hanna- Erney, and such distribution being made strictly in pursuance of the original agreement hereinbefore referred to and the conveyance to the said trustees.

11 9. That the period has arrived, under the direction and provisions of the said last will and testament, when the said property in square 199, known as the homestead, should be sold and the proceeds divided; that the said widow, Catharine Riggles, has departed this life, and of the four children named in the said last will and testament as devisees of the property in square 199, the homestead, three have also died, leaving the defendant Hannah Erney the sole survivor of such devisees.

10. That the complainants have accordingly applied to the said defendant, Hannah Erney, to carry out the agreement hereinbefore set forth, and that an equal division of the proceeds of sale of the said property shall be made to all of the devisees of the said testator in accordance with their said agreement, but that the said Hannah Erney refuses now to acknowledge or recognize this said agreement and inequitably and unjustly asserts and claims that under the technical provisions of the said will she, as sole survivor of the devisees of the property in square 199, is entitled to all of the said property and the proceeds thereof.

12 11. The complainants aver that the agreement set forth in the preceding paragraph of this bill was deliberately and intelligently made on the part of the said defendant, Hannah Erney, and

that the said agreement and conditions to be hereafter kept and performed in relation to the property in square 199 formed and were the only consideration for the distribution and appropriation to the widow and the four children named as devisees of the said property, including the defendant Hannah Erney, of any portion of the proceeds of sale of the property in square 179; that under and by virtue of said will and testament the said defendant and her codevisees were not entitled to any portion of the property in square 179 or in the proceeds thereof, except for their current support, while the said daughters were unmarried, the same being otherwise exclusively the right and property under the said will and testament of the complainants, who, by making the said agreement and strictly performing the same, gave to the defendant Hannah Erney and her codevisees of the homestead about
13 $18,000, being much more than the entire value of the homestead property.

The complainants also say that it was the intention of the testator that the ultimate division of all the estate devised should give to each of his children an equal share, and such intention was recognized by all of the parties to the said agreement, including the defendant Hannah Erney, and was the basis upon which the said agreement was made and distribution of the property of the proceeds of the sales in square 179 was in partial execution of such intention as well as of the said agreement.

The complainants say that in view of the said agreement for an equal division of all the property of the testator and in further view of the fact that in pursuance of such agreement and in execution thereof the said defendant, Hannah Erney, received from the proceeds of the sales in square 179 more than $3,000 in money and her share of nearly $3,000 more appropriated towards her maintenance and support and the preservation of the property in square 199, she cannot now be allowed to repudiate the said agreement and
14 claim under the devise in the said will and testament of the said property in square 199.

These complainants say further that the said defendants, Hannah Erney and her husband, assert exclusive right and claim to the property in square 199, and these complainants have reason to believe and fear that the said defendants will undertake to dispose of the said property regardless of the said agreement and appropriate the proceeds wholly to themselves, in fraud of the rights of the complainants.

These complainants are advised and believe that they have no adequate remedy at law, but that in a court of equity such relief may be had as in equity and in good conscience they are entitled to.

1. The complainants therefore pray that the defendants, Hannah Erney and Charles A. Erney, be made defendants hereto and be required to answer, &c.

2. That the said defendants may be enjoined and restrained from disposing of said property in square 199 until the rights of re-
15 spective parties hereto may be definitely ascertained and settled, or if the said agreement may not be enforced in manner

and form as herein set forth, then that out of the proceeds of such sale there may be reimbursed to the complainants at least the amount paid and advanced from proceeds of the sales in square 179 to the defendant Hannah Erney and on her account, with interest thereon from date of such payments and advance.

3. That the said property in square 199 may be sold under the decree of this court, and the proceeds distributed to the several parties upon the basis of the agreement set forth in paragraphs 5 and 6 of this bill of complaint.

4. That the complainants may have such other and further relief as the exigencies of the case may require and to the court shall seem proper.

DISTRICT OF COLUMBIA:

John Riggles, Mary A. Miller, Sarah A. Turton, Mary Arnold, and S. R. Riggles, being duly sworn, make oath that they have
16 heard read the foregoing bill of complaint by them signed, and that the matters and things therein stated as of personal knowledge are true, and those stated upon information and belief they verily believe to be true.

JOHN RIGGLES.
MARY A. MILLER.
SARAH A. TURTON.
MARY ARNOLD.
S. R. RIGGLES.

Sworn to and subscribed before me the above parties this the 13th day of December, A. D. 1884.

APPLETON P. CLARK,
[SEAL.] *Notary Public.*

17 *Summons to Answer. Issued Dec.* 27, 1884.

In the Supreme Court of the District of Columbia, December 27th, 1884.

JOHN RIGGLES *et al.*, Complainant-, *against* HANNAH ERNEY *et al.*, Defendant-. } No. 9258, Equity Docket 24.

The President of the United States to Hannah Erney and Charles A. Erney, defendants:

You are hereby commanded to appear in this court at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the original bill under pain of attachment and other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk, &c.*,
[SEAL.] By L. P. WILLIAMS, *Ass't Clerk.*

Marshal's Return.

Returned Feb. 3d, 1885. Fees unpaid.
CLAYTON McMICHAEL, *Marshal.*

18 *Answer of Hannah Erney. Filed Feb.* 4, 1885.

In the Supreme Court of the District of Columbia.

JOHN RIGGLES *et al.*
vs.
HANNAH ERNEY and CHARLES ERNEY. } No. 9258. In Equity.

Hannah Erney, the defendant, in this her separate answer says as follows:

1. That she admits the facts set forth in paragraphs 1, 2, and 3 save the existence of the defendant William Riggles.

2. That in answer to paragraph 4 she denies that all the money borrowed on a deed of trust by the executor were applied and appropriated to the support of her mother and the four children, but avers that the said executor used the greater part of it for his private benefit, and further avers and declares that he did not keep up the payments of taxes on all the property and failed to comply with the terms of the will.

3. That, as set forth in paragraph 5, she denies most em-
19 phatically entering into any agreement whatsoever in regard to a division of the homestead property, as it was always her belief and she had been so advised that her brother Thomas, up to the time of his death, was entitled under the will to the homestead property.

4. That she admits signing a paper mentioned in paragraph (6), which was presented to her for her signature, purporting to be an agreement for the appointment of trustees, so as to enable them to sell certain portions of square 179 and pay off the encumberances which had been placed on the property and to pay taxes (which through neglect of the executor had accrued), and after payment of all indebtedness to divide the balance equally; but denies that there was any agreement or condition that the homestead property should be sold and the proceeds divided in the same manner.

5. That she neither admits or denies the facts set forth in item 7, but avers that after the division therein stated her brother, Thomas Riggles, under the impression that he would be the sole
20 owner and possessor of the said homestead property, paid the taxes on the same up to the time of his death, since which time the taxes have been paid by herself and the defendant Charles Erney, her husband.

6. Admits receiving her share with the rest of the children, but does not know the exact amount.

7. That she admits her willingness to adhering strictly to the provisions of the will, and admits that she refuses to acknowledge or recognize any agreement whatever that destroys her right under

"the technical provision" of said will in which "she as sole survivor of the devisees" of the property in square 199 is "entitled to all of the said property and the proceeds thereof."

8. That she denies the existence of such an agreement as is referred to in paragraph 11, and while she admits receiving the benefit of certain funds distributed by the trustee, yet did not know that such was a consideration for an agreement to destroy the
21 purpose of the last will and testament of her deceased father, and, further, she depends upon the statute of frauds as if it were specially pleaded.

And, having fully answered, she begs to be dismissed with her proper costs.

HANNAH E. ERNEY.

DISTRICT OF COLUMBIA, *ss:*

Hannah Erney, being duly sworn, makes oath that she has read the foregoing answer by her subscribed, and that the matters and things therein stated as of personal knowledge are true, and those stated upon information and belief she believes to be true.

HANNAH E. ERNEY.

Subscribed and sworn to before me this 4th day of February, A. D. 1885.

J. ALF. HAYWARD,
Notary Public.

[SEAL.]

22 *Replication. Filed Feb.* 19, 1885.

In the Supreme Court of the District of Columbia.

JOHN RIGGLES *et al.*
vs.
HANNAH ERNEY *et al.*
} No. 9258, Equity Docket 24.

The complainants join issue with the defendant Hannah Erney upon the answer of the said defendant, and will hear the case upon the bill, answer, and proofs (as to the said defendant).

JAS. G. PAYNE,
Sol'r for Plaintiffs.

Feb. 10, 1885.

23 *Testimony on Behalf of Complainants. Filed July 30th,* 1885.

In the Supreme Court of the District of Columbia.

JOHN RIGGLES *et al.*
vs.
HANNAH ERNEY *et al.*
} No. 9258. Equity.

WASHINGTON, D. C., *April* 10, 1885.

Met pursuant to agreement.

Present: Mr. James G. Payne, for the complainants, and Mr. E. B. Hay, for the defendant-.

Whereupon JOHN RIGGLES, a witness on behalf of the complainant-, being duly sworn, testified as follows:

Q. Mr. Riggles, you may give us your name, age, residence, and occupation.

A. John Riggles, Washington, D. C.; of lawful age.

Q. You may state what relation you bear to the late Thomas Riggles.

A. I was his oldest son by the first wife.

Q. State what other children Thomas Riggles had by his first wife and what children he had by his second wife.

A. By the first wife there was James Riggles, now dead; William Riggles, now dead; Mary Ann Miller, who is still living, and
24 Sarah A. Turton; by the second wife, Thomas Riggles, who is now dead; Catharine V. Evans, also dead; Maria V. Riggles, also dead; Hannah Erney, one of the defendants.

Q. Mr. Riggles, when did Jno. V. Turton, the executor of your father's will, die?

A. The 9th of May, 1873.

Q. Please state, if you know, whether in the year 1873 a meeting of the children of said Thomas Riggles was held with a view to selling any portion of the property devised by the said Thomas; and, if so, when such meeting was held, who were present, whether the defendant Hannah Erney was present; and, if so, what was said and done while she was so present.

A. Yes, sir; such a meeting was held the last of May, 1873, at the homestead. All the heirs were present. All the children then living were present, including Hannah Riggles, now Hannah Erney. We agreed to sell a square of ground, No. 179, and pay off the indebtedness and divide the balance.

Q. What indebtedness was referred to in that discussion?

A. The indebtedness for taxes on the square of ground, and
25 the mortgage debt upon it, and the indebtedness of mother, and taxes due on the house occupied by her, being property in square 179.

Q. Please state who of the children were occupying the homestead with your mother.

A. All but Hannah was occupying it with my mother. All of her children were living there except Mrs. Evans.

Q. Had they been occupying that house since the death of your father?

A. Yes, sir.

Q. If you know, you may state what the indebtedness of the widow consisted of whom you designate as the mother.

A. I cannot remember the amount now. It was largely her expenses for living and was partly for taxes on the homestead.

Q. Was anything else said or done at that meeting of the children about which you have testified?

A. We agreed to sell the square of ground and pay off the indebtedness and divide the square of ground—the proceeds of the square of ground.

Q. What was done after that with relation to selling the square of ground?

A. We had another meeting in June, 1873, and at that
26 meeting there was a deed read that had been prepared, and all the heirs being present, and when the deed was read for our signature I objected on the part of the children of the first wife, stating that it was not in accordance with father's will. The will read that we were to give so much of the proceeds of that square to the children of the last wife as would make their house and lot equal to our share, providing the proceeds exceeded the value of the house and lot; and Mr. Evans, on the part of the children of the last wife, said we would share and share alike in the house at the death of mother; that it would not be fair for the children of the last wife to do all the waiting and the children of the first wife get all their share at once; that it would only be equitable for the children of the first wife to do part of the waiting and share equally with them, so that it would be literally carried out, and we consented to divide equally on that basis, and would have refused to have sold any more than sufficient to pay off the indebtedness unless they would agree to this equitable division, which was agreed to by all the heirs without any objection.

Q. Was this all before the deed that you speak of was executed?

27 A. It was before we signed the deed; we would not have signed it without an equitable agreement.

(Handing witness paper.)

Q. Is that the deed to which you refer?

A. Yes; this is the deed.

(Paper filed, marked "Exhibit A.")

Q. Who is the Hannah Riggles whose name appears to that deed?

A. Mrs. Erney.

Q. Under the powers of that deed you and Mr. Edmonds sold the balance of the properey in 179?

A. Yes, sir.

Q. Can you tell us what was done with the proceeds of such sale?

A. After paying the indebtedness it was divided equally among all the heirs.

Q. Can you state the amount or about the amount which was paid to Hannah Riggles, now Hannah Erney?

A. About $3,000.00.

Q. Was a similar amount paid to each of the others?

A. Yes, sir.

28 Q. Do you remember and can you state what amount was paid from those proceeds of sale to discharge the indebtedness of Mrs. Riggles, the widow, on account of her homestead expenditures?

A. I cannot remember distinctly the amount.

Cross-examination.

By Mr. HAY:

Q. Will you please state whether at that meeting in June, 1873, that there was any agreement made that the homestead property was to be sold and the proceeds divided equally among all the heirs?

A. Yes; upon the death of mother.

Q. Was this an agreement, sir, or an understanding?

A. It was an agreement of all present.

Q. Was there a written agreement?

A. No, sir.

Q. That was your understanding ?

A. Yes, sir.

Q. How do you know that it was the understanding of Thomas Riggles or of Hannah Riggles, now Erney?

A. Because they were present and heard the entire statement and did not object.

29 Q. You mean you did not hear any objections from them?

A. Of course I did not hear any.

Q. Did you hear any expression from them at all or either of them upon this subject?

A. It was the universal consent; we would not have signed the deed unless there had been.

Q. How do you know that, sir? The deed does not refer to that.

A. The deed refer-ed to a point that was very vital to us, the children of the first part, affecting our interest materially to the amount of at least seven or eight thousand dollars, the value of the house and lot, for we would have had, according to the will of our father, that much more to divide.

Q. Did you say that upon your construction of the will you objected to these proceedings?

A. Certainly.

Q. Please state why.

A. The will was very plain. If the proceeds of that square of ground was more than the value of the house and lot the children of the first wife, according to the will, were to give the children

30 of the last wife a sufficient quantity of the proceeds of sale of the lots to make the children of the last wife's share equal to ours.

Q. When did Thomas Riggles die?

A. I do not remember.

—. Were the taxes on the homestead property paid by this sale?

A. Yes, sir; and the indebtedness of my mother; I do remember the amount.

Q. Who has paid the taxes since that time?

A. I do not know.

Q. Who paid them up to the time of Thomas Riggles' death?

A. I do not remember.

JOHN RIGGLES.

Subscribed and sworn to before me this 10th day of April, A. D. 1885.

OSCAR NAUCK, *Examiner.*

31 GEORGE W. EVANS, a witness on behalf of the complainant, being duly sworn, testified as follows:

By Mr. PAYNE:

Q. You reside in Washington and are of lawful age?

A. Yes, sir.

Q. Please state whether you are acquainted with the several parties to this suit, and in what manner, if any, you are related to them or either of them.

A. I am acquainted with all of them. I am the husband of one of the heirs, Catharine B. Evans, daughter of Thomas Riggles, daughter of the second wife.

Q. Were you present at a meeting of the children of Thomas Riggles, deceased, during the month of May, 1873?

A. I was.

Q. Were all of the children by both of the marriages present who were then living, including the daughter now known as Mrs. Hannah Erney?

A. They were.

Q. What was said or done, if anything, relating to the subject of a sale of ground in square 179?

32 A. A meeting was held for the purpose of legally adjusting and closing the estate of Thomas Riggles. There was a general discussion as to the manner of settling the affairs—they were in quite an encumbered shape at that time—and the appointment of representatives from each side—that is, of the first and second wife—to properly dispose of the same.

Q. State, if you know, what was the immediate occasion for selling this ground.

A. The ground in square 179 was very heavily encumbered, drawing a heavy rate of interest. That interest had not been paid, I think, for two years or more, and the mortgagee threatened to sell the same. Besides the general and special taxes had accumulated for several years back, also drawing interest, and there was no way to pay the same except from the proceeds of the sale of ground. There were also other debts of a personal character against the widow of the estate for household supplies, furniture, borrowed money, and repairs to the house, as well as taxes, general and special, on the homestead.

Q. Who was designated at that meeting as the two repre-

33 sentatives to attend to the sale?

A. Mr. John Riggles was selected to represent the children of the first wife and I to represent the children of the second wife, both of which selections was unanimously approved by all the heirs.

Q. Was there another meeting of the heirs upon this subject? If so, when and who were present and what was said and done?

A. There was another meeting about the first of June, all the heirs present. A deed was presented—"Exhibit A" is the paper referred to—which had been prepared by a lawyer in the meantime—that is, between these meetings—which was read and approved by all present after several questions by the heirs on both sides as to what would be their rights in the matter. The children by the first wife objected to the deed unless they were assured that after the death of the widow the homestead was to be sold and the proceeds divided equally among all in order to make each heir's share equal on the final disposition of the estate. With this assurance
34 from the trustees, that that would be the final understanding and agreement, they all signed it.

Q. Was the property sold in the square 179?

A. Yes, sir; and after paying the mortgage and interest, all special and general taxes, and all special and general taxes on the homestead, and all the personal and miscellaneous debts that had been incurred by the widow the balance was divided by myself, representing the trustees, equally among all the heirs of the estate.

Q. State, if you can, what amount was distributed to each of the children or heirs.

A. I think about $3,000.00.

Q. Please state, if you can, what amount was paid from these proceeds of sale on account of the property in square 199 and what amount was paid for the widow and her household at that time.

A. The amount paid for taxes, general and special, and interest on same was $552.93; amount paid for household, miscellaneous expenses, borrowed money, was $2,108.85. In addition to
35 this she received $500 District of Columbia bonds as an award for damages to this property by the District.

(Witness files a statement of the bills and other items paid by him on account of homestead and of the widow and her household, marked "Exhibit B.")

Cross-examination.

By Mr. HAY:

Q. Do you know when Thomas Riggles died?

A. December 26th or 27th, 1883.

Q. When was the distribution of the estate of which you speak made?

A. It was made in 1873, 1874, and I think in 1876 or 1877.

Q. When were the taxes paid for the homestead?

A. 1873 and 1874.

Q. Who has paid the taxes on the homestead since that time?

A. They were paid by the widow, Catharine Riggles, I believe, up to the time of her death. It was an arrangement between the widow and her sons that in lieu of receiving the rent—he was living in

the house; she lived with me; he paid the taxes and gave her the balance for spending money.

36 Q. When did she die?

A. This last spring some time—she died November, 1884; she had been living with me from the 1st of September, 1876, to the 1st of August, 1883.

Q. Was she present with the heirs at this meeting?

A. Yes, sir.

Q. At the second meeting, in June, 1873, was the will of Thos. Riggles discussed?

A. Yes, sir; it was discussed at both meetings.

Q. Was there that you knew any special agreement entered into with regard to the settlement of this estate of which you have spoken, or was it but an understanding implied by the silence of all parties present and in not openly objecting?

A. It was a distinct and positive verbal agreement, thoroughly understood and consented to by all, without reservation; we did not wish to send the deed back for a change, fearing that delays were dangerous; we were anxious to settle.

37 Q. Do you know that Hannah Riggles Erney understood positively that she was consenting and agreeing to breaking the tearms of her father's will?

Objected to as being leading in its conclusions and as asking the witness for the mental understanding of another person as to the legal effect of the agreement.

A. I do know that she did.

Q. Did she tell you that she understood it that way?

A. As I said before, I represented the children by the second wife, and my wife's interests, like Mrs. Erney's, I was bound to protect in every way. I therefore consulted with her, explained the terms of the deed, read the will to her, and asked her, as well as the other heirs by the second wife, if she thoroughly understood and consented to selling the property. She was satisfied, and so expressed herself.

Q. Did you ever have any talk with Thomas Riggles, Jr.?

A. Nothing more than at the meeting.

GEORGE W. EVANS.

Subscribed and sworn to before me this 10th day of April, 1885.

OSCAR NAUCK, *Examiner.*

38 SARAH A. TURTON, being duly sworn on behalf of complainant-, testified as follows:

By MR. PAYNE:

Q. You are a daughter of Thos. Riggles referred to in this bill as testator?

A. Yes, sir.

Q. By the first or second wife?

A. By the first.

Q. You were present at the two meetings of the children and devisees of Thomas Riggles, deceased, in May and June, 1873, which have been testified to by the preceding witnesses?

A. I was.

Q. Was Hannah Riggles, now Hannah Erney, present?

A. She was.

Q. During the whole of the time?

A. Yes, sir.

Q. Is the account given by the two other witnesses of what occurred at the meeting in May substantially correct?

A. To the best of my recollection it is.

Q. Will you please state as nearly as you can what was said and done at the second meeting?

39 A. At the second meeting the deed was read that had been drawn up between the two meetings and appeared satisfactory until they began to discuss matters. In regard to the division of the property the heirs of the first wife objected to sharing equally with the second children without an understanding as to the remaining property, the homestead. The trustee on the part of the children of the second wife explained to us there should be equal division after mother's death of the homestead. That appeared to give satisfaction to all present. I was never aware but that it was in writing until after the death of my mother; never felt any doubts but what all understood alike.

Q. Was the paper that was read at that time about which you have spoken the one that you signed?

A. Yes, sir, and that we all signed.

Q. Was there a full discussion about the division of the proceeds of the sale of the square and of the homestead property at that meeting?

A. It was talked of and explained to us by Mr. Evans, representing the children by the second wife; I believe all thoroughly understood it.

40 Q. Was there any dissent or objection on the part of any one as to the sale and division of the proceeds to be made after the widow's death?

A. None whatever.

S. SARAH A. TURTON.

Subscribed and sworn to before me this 10th day of April, 1885.

OSCAR NAUCK, *Examiner.*

41 EXHIBIT A.

This indenture made this eleventh day of June in the year of our Lord one thousand eight hundred and seventy-three between John Riggles and Catharine, his wife, William Riggles and Mary, his wife, John Miller and Mary A. Miller, his wife, Sarah A. Tur-

ton, Thos. Riggles and A. M. Riggles, his wife, George W. Evans and Catharine V. Evans, his wife, Maria Riggles, Hannah Riggles and Catharine Riggles, all of the city of Washington, in the District of Columbia, of the one part, and John Riggles and George W. Evans, of the said city and District of the second part. Whereas, the said Catharine Riggles is the widow and the said John Riggles, William Riggles, Mary A. Miller, Sarah A. Turton, Thomas Riggles, Catharine V. Evans, Maria Riggles and Hannah Riggles are the heirs and devisees of Thomas Riggles, late of the said city and District, deceased.

And whereas the said Thomas Riggles died leaving a last will and testament executed on the thirtieth day of October, in the year one thousand eight hundred and sixty-three, which last
42 will and testament was duly admitted to probate and record in the office of the register of wills for the county of Washington in the District of Columbia.

And whereas, the said testator by the said last will and testament constituted and appointed John B. Turton the sole executor thereof with full power to convey, sell, or in any way dispose of, all or any part of the lots in square one hundred and seventy-nine (179) in the city of Washington, either by subdivision or according to the original plan of said square for the use and benefit of the said widow and children.

And whereas, the said John B. Turton did subdivide the said square into lots numbered from one (1) to eighty (80) inclusive, which subdivision is recorded in Subdivision Book W. F. 1, folio 103, in the surveyor's office of the said District.

And whereas, the said John B. Turton has recently died, having sold and conveyed portions of the said square and leaving unsold lots numbered from one (1) to forty-two (42) inclusive and
43 from sixty-one (61) to eighty (80) inclusive of the said subdivision of the said square, the said unsold portions being subject to a certain deed of trust to E. M. Nourse given on the 26th day of June, 1871, to secure the payment of seven thousand dollars in two years, with interest, and subject also to certain unpaid general and special assessments; and whereas, the said parties of the first part are desirous that the remainder of the said square shall be sold as speedily as the same may reasonably be done for the purpose of paying off the said trust indebtedness and the taxes and assessments upon the said property and upon other real estate left by said testator and for the further purpose of an equitable division of the nett proceeds of such sale or sales among the said widow and children of the said Thomas Riggles, testator, now therefore, this indenture witnesseth, that for and on consideration of the premises, and the sum of five dollars current money to said parties of the first part in hand paid by the said parties of the second part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, they the said parties of the first part have granted,
44 bargained, sold, aliened, released, enfeoffed and conveyed and do by these present-, grant, bargain, sell, alien, enfeoff, release

and convey unto the parties of the second part, their heirs and assigns, all of the lots, pieces and parcels of ground, lying and situate in the city of Washington in the District of Columbia, being known and described as lots numbered from one (1) to forty-two (42) inclusive and from sixty-one (61) to eighty (80) inclusive of John B. Turton subdivision of square numbered one hundred and seventy-nine (179) as the same is laid down in Subdivisor Book W. S. folio 103 in the office of the surveyor of the said District of Columbia, together with all the improvements, ways, easements, rights, privileges and appurtenances to the same belonging or in anywise appertaining, and all the estate, right title, interest and claim whatsoever either at law or in equity, of the said parties of the first part of, in and to the said lots, pieces and parcels of ground and premises.

To have and to hold the said lots, pieces and parcels of ground and premises with the appurtenances unto and to the use of
45 the said parties of the second part their heirs and assigns.

In and upon the trusts nevertheless hereinafter mentioned and declared, that is to say. In trust to the said parties of the second part to sell and dispose of the said property at public or private sale in single lots or otherwise or upon such terms of payment as they may deem advisable, and to make execute and deliver all proper and sufficient conveyances of the said property so sold and disposed of, and without any liability or the part of the purchasers to see to the application of the purchase-money, and the proceeds of such sales to dispose of as follows: To pay and defray all necessary costs, charges and expenses incurred in and about such sales and in and about this proceeding including preparation of papers, attorneys' fees, abstracts of title, advertisements auctioneers' fees, and charges and all other proper charges, also to pay and discharge all taxes and assessments general and special that may now be due and unpaid upon the said property herein conveyed or that may become due upon the same while in the possession of the said parties
46 of the second part, and all taxes that may be levied or assessed upon lot numbered seven (7) and part of lot numbered eight (8) in square numbered one hundred and ninety-nine (199) the same being also property of the said Thomas Riggles deceased, before the final execution of the trust herein contained, also to pay and discharge the indebtedness encur-ed by the said deed of trust of the 26th of June 1871 to E. M. Nourse with interest and all proper costs and charges thereon an- procure a sufficient release of the same, with power to the said trustees to make the said foregoing payments in such order as they may deem advisable or necessary, and after paying and discharging the liens, taxes assessments, costs, charges, expenses and commissions hereinbefore specified, to distribute whatever may from time to time remain of the proceeds of the said sales, among the said widow and children heirs and devisees of the said Thomas Riggles deceased, in equal proportions, share and share alike.

In testimony whereof the said parties of the first part have here-

unto set their hands and seals this day and year first hereinbefore written.

	CATHARINE RIGGLES.	[SEAL.]
47	JOHN RIGGLES.	[SEAL.]
	CATHARINE RIGGLES.	[SEAL.]
	W. RIGGLES.	[SEAL.]
	MARY RIGGLES.	[SEAL.]
	JOHN MILLER.	[SEAL.]
	MARY A. MILLER.	[SEAL.]
	SARAH A. TURTON.	[SEAL.]
	THOMAS RIGGLES.	[SEAL.]
	A. M. RIGGLES.	[SEAL.]
	CATHARINE V. EVANS.	[SEAL.]
	GEORGE W. EVANS.	[SEAL.]
	MIRA RIGGLES.	[SEAL.]
	HANNAH RIGGLES.	[SEAL.]

Signed, sealed, and delivered in presence of—
T. DRURY.

The words "together" and following to sales, both inclusive, at foot of 6th page, stricken out before execution.

JAMES G. PAYNE.

DISTRICT OF COLUMBIA, *County of Washington*, } *To wit:*

I, T. Drury, a justice of the peace in and for said county and District aforesaid, do hereby certify that Catharine Riggles, John Riggles, Catharine Riggles, William Riggles Mary Riggles, John Miller, Mary A. Miller, Sarah A. Turton, Thomas Riggles, A. M. Riggles, Catharine M. Evans, George W. Evans, Maria Riggles, and
48 Hannah Riggles, parties to the foregoing instrument bearing date the 11th day of June, A. D. 1873, and hereunto annexed, personally appeared before me in the said county and each acknowledged the same to be their act and deed, the said parties being well known to me to be the same who executed and acknowledged the same.

Given under my hand and seal this 11th day of June, A. D. 1873.

T. D-URY, *J. P.* [SEAL.]

49 EXHIBIT B.

Bills Paid from Estate on ac. of Mrs. Riggles and Lots 7 and 8, Square 199.

Annual tax 1873..	74 80
" " 1874	99 43
Water-main tax 1873	30 12
Geo. Bogan, coal	82 55
Jno. O. Hagan, plumbing	160 00
Jno. T. Mitchell, dry goods	28 55
W. B. Moses, furniture	135 09

Riggles and Gadsby, groceries	1,119 76
F. Willner, paper-hanging	40 50
Thos. Riggles, cash lo-ned widow	500 00
W. D. Wyville, stoves, repairs, &c	52 40
	$2,313 20
Special improvement tax	348 58
	$2,661 78

50 *Testimony on Behalf of Defendants. Filed July* 30, 1885.

In the Supreme Court of the District of Columbia.

RIGGLES *vs.* ERNEY. } No. 9258. Equity.

WASHINGTON, D. C., *July* 15, 1885—10.30 a. m.

Met pursuant to agreement.

Present: Col. James G. Payne, solicitor for complainant; Mr. E. B. Hay, solicitor for the defendant.

Whereupon HANNAH E. ERNEY, a witness on behalf of the defendant, being duly sworn, testified as follows:

By Mr. HAY:

Q. State your name, please, and your residence.

A. Hannah E. Erney; 907 16th street northwest.

Q. You are a party to this suit, one of the defendants?

A. Yes, sir.

Q. One of the heirs of Thomas Riggles?

A. Yes, sir.

Q. Now, Mrs. Erney, will you please state, without any ques-
51 tions or particular time, your interest in and connection with the disposal of a square of ground in the northwest section of the city formerly belonging to Thomas Riggles, and also a deed of trust that was made at a meeting of the heirs and signed by them.

A. A square? You mean 179. I always understood that ground was sold to pay the indebtedness of mother and then it was to be divided equally, and that is all. It was to pay for the taxes on the house that I live in. That is the way I always understood it. I do not remember of any meeting but one.

Q. When did that occur?

A. I remember that it occurred, but I do not remember the time.

Q. When was this meeting held?

A. I remember the meeting, and it was held at the old home, the meeting that I remember about.

Q. Don't you remember when? It has been testified that one meeting was held in May, 1873, but that there was also a second meeting, and I want you to state if you were present at both of those meetings and what occur-ed then.

A. I remember they handed me a deed, and I was to sign that deed; that was for selling the lots on 16th street. As for
52 signing any other papers, I do not remember anything about them.

Q. Do you remember, Mrs. Erney, whether there was one meeting or two meetings at which you were present?

A. I do not remember but one meeting.

Q. And will you please state what was done at that meeting, what was discussed, what was represented to you, or your understanding of the object of the meeting?

A. All I understood was that the property had to be sold and to pay mother's indebtedness and, of course, the taxes which we expected Mr. Turton to have paid, which were not.

Q. Who was Mr. Turton?

A. He was the executor.

Q. Who was present at that meeting?

A. I remember all my own family was there, and they signed the paper—the deed—but as for the second meeting I do not remember.

Q. Was your mother present at that meeting?

A. Yes, sir.

Q. Your brother?

A. Yes, sir.

53 Q. Now, don't you remember or can you state what was discussed at that meeting with regard simply to the square 179?

A. The square 179—that was all that we had to do with. They said we had to sign that deed; that is all I remember; and it had to be equally divided, of course, after mother's debts were paid.

Q. That is square 179?

A. Yes, sir.

Q. You know Mr. George W. Evans, do you?

A. Yes, sir.

Q. Your relationship to him is what?

A. He was our guardian after Mr. Turton died; he was on our side and Mr. John Riggles was on the other side.

Q. Now, what do you mean by "our side"?

A. My sisters; my own sisters.

Q. You mean that Mr. George W. Evans was your representative in this transaction?

A. Yes, sir.

Q. Did Mr. Evans explain to you the object of this meet-
54 ing and what was expected of you and your relatives?

A. I do not remember of any explanation from Mr. Evans.

Q. Did you give your consent to — act for you in the premises?

A. Yes, sir.

Q. Now, what were the duties of Mr. Evans in the premises concerning the interest of you all?

Mr. PAYNE: Question objected to as incompetent.

A. Why, he was to sell that property and to divide it and to see to our interests and to see that we got our equal share.

Q. Now, what property?

A. Square 179.

Q. Was anything said at the time concerning the division of that square after the debts were paid—the division of the proceeds?

A. To be evenly divided amongst the children—that is all that was said—after the debts were paid out of that square.

Q. Now, what was said at that meeting or at any time concerning the disposition of square 199, of the homestead?

A. My understanding was there never was anything said about the homestead.

55 Mr. PAYNE: I object to the understanding.

The WITNESS: I always understood it was to go to my brother at my mother's death.

Q. Have you seen the will of your father?

A. Yes, sir.

Q. You know the contents of that will?

A. Yes, sir.

Q. Did you sign any agreement or did you enter into any agreement whatever concerning the disposition of the homestead property in square 199?

A. No, sir; never heard of any agreement until after the death of my mother.

Q. Then you did not enter into any agreement, oral or written, concerning the disposal of that square?

A. No, sir; never heard of any.

Q. Did you know of the existence of any indebtedness on this property incurred for clothing and groceries and such?

A. My mother owed that; yes, sir. She thought that Mr. Turton had paid all their bills, and she came to find out, at his
56 death, that he had not. He had used this money for himself.

Q. Did you ever hear of any agreement?

A. No, sir; not until after her death. I always heard that this house was for my brother.

Q. Who told you that?

Mr. PAYNE: Question objected to.

A. My brother always told me so and my mother always told me so.

Mr. PAYNE: The answer is objected to.

Q. What was the object in selling off square 179, as represented to you? Did they say?

A. To pay off debts for groceries and for clothing for us.

Q. You did sign a deed?

A. Yes, sir.

Q. For what purpose?

A. For that purpose—for the indebtedness that my mother owed

and to pay the taxes and then to be divided. That is the only deed that I signed.

Q. See if that is the deed you signed (handing witness paper).

A. Yes, sir.

Q. That is the deed that you signed?

57 A. Yes, sir.

Q. Did you ever sign any other deed regarding this property, either in 179 or that of the homestead property?

A. No, sir; no other deed.

Q. It has been testified that the proceeds were divided. You received some of the proceeds of square 179?

A. Yes, sir.

Q. How much did you receive?

A. I received equal share—as much as the rest.

Q. Was it ever said in these conversations with Mr. Evans, who represented your two sisters and brother, that in entering into an agreement to dispose of the homestead property or to divide the property out equally that it would be breaking the will?

A. No, sir; I never had such a conversation.

Q. Do you remember of any money being borrowed on a deed of trust by the executor upon the homestead property?

Mr. PAYNE: That is objected to unless she has personal knowledge of the transaction.

A. No, sir; I do not remember any.

58 Q. Where you entitled to a maintenance from this property?

Mr. PAYNE: Question objected to as calling for incompetent evidence.

A. Yes, sir.

Q. During what period?

A. From the time of my father's death until I was married.

Mr. PAYNE: The answer is objected to as incompetent.

Q. When were you married?

A. In 1877.

Q. When did your father die?

A. I have forgotten exactly myself what year.

Q. You occupy the homestead property, do you?

A. Yes, sir.

Q. You have been living there since your mother's death?

A. Yes, sir.

Q. Then you never at any time entered into any agreement to dispose of the homestead property, in square 199, or to make an equal division of it at the death of your mother?

A. No, sir; never.

Cross-examination.

By Col. PAYNE:

59 Q. You say that there was but one meeting of the heirs at which you were present, and that was held in the old home?
A. Yes, sir.
Q. Are you quite certain that there was but one meeting?
A. I say that is all I remember of.
Q. Can you give us the time that meeting was held?
A. No, sir.
Q. What time in the year?
A. I don't remember the year.
Q. What time in the day?
A. In the morning.
Q. Who was there?
A. All the family.
Q. Who did the talking?
A. Mr. Evans and Mr. Riggles did the talking, as far as I can remember.
Q. What did Mr. Evans say?
A. He just said that the property had to be sold and divided equally after the debts were paid.
Q. Is that all he said?
A. That is all that I understood.
Q. What did Mr. Riggles say?
A. He just referred to him. I don't remember of his saying any more.
60 Q. Don't remember of Mr. Riggles saying anything?
A. No, sir.
Q. Did you hear any other — say anything?
A. I do not remember.
Q. How long were the parties together on that occasion?
A. Not long; I do not remember how long.
Q. How soon after breakfast did you meet there?
A. It was not right after breakfast, but it was in the morning.
Q. Was it near lunch time when you adjourned?
A. I do not remember. It was not soon after breakfast; it was before dinner, though.
Q. Tell us how soon after breakfast.
A. I say I do not remember how soon.
Q. Were you there an hour together?
A. Just about, I guess.
Q. What were you doing all that time?
A. They were talking about signing this deed and selling the property; explaining it to my mother.
61 Q. Now, tell me what they said explaining it to your mother.
A. I do not know what they said to her.
Q. Where was your mother sitting in the room?
A. That I do not remember.
Q. How far from you?

A. That I do not remember.
Q. How far was Mr. Riggles or Mr. Evans sitting from you?
A. I don't remember that, even.
Q. Could you hear all they said in an ordinary tone of voice?
A. Yes. I did not pay much attention to what they were saying at the time.
Q. How large a room were you sitting in?
A. A good-sized room. I don't know exactly.
Q. Was this deed then ready to be signed at this meeting?
A. We all signed this deed.
Q. Was it ready to be signed at this meeting? Had it been prepared beforehand?
A. That I forget.
Q. Who had the deed?
62 A. Mr. Evans handed it to me.
Q. And it was all filled up ready to be signed, was it, at that time?
A. When I saw it.
Q. Had nothing been said to you previously to that time about selling square 179?
A. No, sir; never heard anything about it until after the death of my mother; then Mr. Riggles came, and he informed me of it and wanted me to sign.
Q. Had nothing been said to you, previous to the time at which you signed the deed, about selling the property, square 179?
A. I do not remember anything being said about it.
Q. Then do I understand that at this meeting at which you signed the deed you had *on* intention of selling square 179? Is that true?
A. Yes, sir.
Q. Did you sign the deed without reading it?
A. Yes, sir.
Q. Mrs. Erney, you say that you knew the contents of your father's will. Did you know it at the time that you signed this deed?
63 A. No, sir; I had never heard it read.
Q. Never heard the will read?
A. No, sir.
Q. How did you know what the will directed as to the maintenance of the family?
A. I did not know until after I signed it, and then my brother told me.
Q. Which brother?
A. The only one that I have—Thomas.
Q. When?
A. After I signed the deed.
Q. How long afterwards?
A. About two days.
Q. Then, at the time you signed this deed you did not know what the provisions of your father's will were?
A. No, sir.

Q. Are you quite sure that nothing was said about your father's will at this meeting at which the deed was signed?

A. I do not remember anything being said about the will.

Q. Are you able to state that there was not anything said about the will?

A. No, sir; I am not able to state.

Q. Have you any recollection of the words used by any
64 person at that meeting in discussing the subject of sale?

A. No, sir.

Q. In the distribution of the proceeds of the sale of square 179 you got about $3,000.00, did you not?

A. Yes, sir.

Q. Did either of the first children get more than that?

A. Not that I know of.

Q. Did you understand that you were all to share equally in square 179, and that the first children were to have nothing in square 199?

A. Yes, sir.

Q. You say that it was said at this meeting that the object of the sale was to pay the debts. Did you understand how much the debts were at that time?

A. No, sir; not at that time.

Q. Did you understand whether or not it would take the sale of the whole square to pay the debts?

A. No, sir.

Q. You had been living with your mother in the homestead property from the time of your father's death until the sale of this property, had you not?

A. Yes, sir.

65 Q. Supported by the mother or out of the same fund with her?

A. Yes, sir.

Q. The groceries and supplies used in the house were for the benefit of you as well as the rest, were they not?

A. Yes, sir.

Q. You say you have been informed or were informed a couple of days after this deed was executed of the provisions of your father's will. Do you recollect that that will provided that after a certain time all that was left of square 179 was to be sold and divided amongst the first set of children?

A. I understood it was to be divided. It was to be divided amongst us all.

Q. By the will?

A. Yes, sir.

Q. Is that all the information that your brother gave you about the contents of the will?

A. No, sir; the only thing he said about the will, telling me that I was to have a home there as long as I staid unmarried, and then at the death of mother that that home was to go to him.

Q. That is all that he told you about the contents of the will?

A. Yes, sir.

66 Q. He told you nothing about what the will directed as to square 179?

A. No, sir.

Q. Have you never seen your father's will?

A. Yes, sir.

Q. Have you read it?

A. Yes, sir.

Q. Don't you know that it provides that square 179 should be finally sold and should be divided among the first set of children?

A. No, sir; I do not understand it to read that way.

Q. You are quite sure of that?

A. I do not understand it that way.

Q. You understand the English language, do you not?

A. Yes, sir.

Q. I ask you now if you do not know that the will provided that when square 179 was finally sold under the provisions of the will the proceeds should be divided amongst the first set of children.

A. Yes, sir.

Q. Then, Mrs. Erney, if you got as much as they did of square 179 and you got all of square 199, do you think your father's

67 wishes are carried out?

A. Yes, sir.

Redirect examination.

By Mr. HAY:

Q. With regard to the money that you received from the proceeds of this square, you have just testified that you consider that your father's wishes were carried out. To what did you think that money that you received applied?

Mr. PAYNE: Question objected to.

A. Because it was left to my brother, and I am the only heir.

Q. You received the money from the square that your father's will stated should be divided amongst the other heirs. Now, how did you consider yourself entitled to that money?

A. I was an heir, too.

Q. But you state, in answer to a question, that you understood you- father's will. Now, did that will state that you should receive proceeds from that square as well the proceeds from square 199?

Mr. PAYNE: Question objected to as calling for incompetent evidence.

A. Yes, sir; I considered myself entitled to it.

68 HANNAH E. ERNEY.

Sworn to and subscribed before me this 22nd day of July, A. D. 1885.

OSCAR NAUCK, *Examiner.*

69 In the Supreme Court of the District of Columbia.

RIGGLES *et al.*
vs.
ERNEY *et al.* } No. 9258. In Equity.

DISTRICT OF COLUMBIA, *ss:*

Be it known that at an examination of witnesses begun and held on the fifteenth day of July, A. D. 1885, within noted, when the deposition hereto attached was taken, I, Oscar Nauck, an examiner in chancery, did cause to be personally present at the office of Edwin B. Hay, Esq., No. 1425 New York Ave. N. W., in the city of Washington, in said District, Hannah E. Erney, to testify on the part and behalf of the defendant in a certain cause now pending in the supreme court of the District of Columbia, wherein John Riggles *et al.* are complainants and Hannah Erney *et al.* are defendants.

DISTRICT OF COLUMBIA, *ss:*

I, Oscar Nauck, examiner in chancery, do hereby certify that the deposition her- attached was taken down by me and reduced to writing in the presents of and from the oral statements of — at the time and place designated in the caption above, and after *they* had been reduced to writing *were* then & there by me read over to the witness, and by her subscribed in my presence and in
70 the presence of counsel for the parties respectively, within noted, who were then and there attending, the witness having — by me first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matter at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause or in any manner interested therein.

OSCAR NAUCK,
Examiner in Chancery.

71 In the Supreme Court of the District of Columbia.

JOHN RIGGLES *et al.*
vs.
HANNAH ERNEY *et al.* } No. 9258. Equity.

I, Oscar Nauck, an examiner in chancery, do hereby certify that the within depositions were taken down and by me reduced to writing in the presence of and from the statement of the witnesses on the 10th day of April, A. D. 1885, at the law office of James G. Payne, Esq., in the city of Washington, D. C., and by me read over to the witnesses and by them subscribed in my presence, the witnesses having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matter at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause or in any manner interested therein.

OSCAR NAUCK, *Examiner.*

72 *Decree in Special Term Dismissing Bill. Filed Nov.* 14, 1887.

In the Supreme Court of the District of Columbia.

RIGGLES *et al.*
vs.
ERNEY *et al.* } No. 9258. Equity.

This cause having been duly calendared and argued and submitted and the proofs read and considered, and it appearing to the court that the provisions of the statute of frauds in respect to contracts for and conveyances of interests in real estate present an insurmountable barrier to granting the relief pr-yed upon the case as made in the bill and attempted to be made out in proof, it is this 14th of November, A. D. 1887, ordered, adjudged, and decreed that the bill in this cause be dismissed with costs.

WM. M. MERRICK, *A. J.*

Appeal to General Term. Filed Nov. 21, 1887.

The complainants hereby appeal from the decree in this causdismissing the bill of complaint.

Nov. 21, 1887.

JAMES G. PAYNE,
Sol. for Comp't.

Appeal, as ordered, entered.

BY THE CLERK.

73 *Appeal Bond. Filed Dec.* 9, 1887.

In the Supreme Court of the District of Columbia, the 9th of Dec., 1887.

JOHN RIGGLES and Others
vs.
HANNAH ERNEY and Others.

The plaintiffs having appealed to the general term from the decree pronounced herein on the 14th of Nov., 1887, in the equity court, and Robert Johnson, surety for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its judgment which they agree may be pronounced against all of them.

GEORGE W. EVANS, *Appellant.*
ROBERT JOHNSON, *Surety.*

Approved Dec. 9, 1887.

WM. M. MERRICK, *A. J.*

74 *Decree in General Term. Filed Feb.* 18, 1890.

In the Supreme Court of the District of Columbia.

JOHN RIGGLES *et al.*
vs.
HANNAH ERNEY and CHAS. ERNEY. } No. 9258. In Equity. Doc. 24.

This cause came on to be heard at this term of the court on appeal by the complainants, John Riggles *et als.*, from the decree passed therein on the 14th day of November, A. D. 1887, dismissing the bill with costs, and was argued by counsel for the respective parties and submitted. Upon consideration thereof, it is now here, this 18th day of February, A. D. 1890, adjudged and decreed and is hereby affirmed with costs, to be taxed by the clerk.

By the court:

A. B. HAGNER.

Appeal to the Supreme Court U. S. Filed March 1, 1890.

JOHN RIGGLES *et al.*
vs.
HANNAH ERNEY *et al.* } No. 9258. In Equity. Doc. 24.

Now come the complainants on this 18th day of March, A. D. 1890, and in open court pray an appeal to the Supreme Court
75 of the United States from the decree passed by this court, sitting in general term at its present term, to wit, on the 18th day of Feb., A. D. 1890, affirming a decree past in the special term of this court on the 14th day of Nov., 1887; which said appeal is allowed. The penalty of the bond to be given by the said complainants is fixed at the sum of one hundred dollars.

A. B. HAGNER.

Appeal Bond to the S. C. U. S. Filed April 15, 1890.

In the Supreme Court of the District of Columbia, the 18 Day of March, 1890.

JOHN RIGGLES *et al.*
vs.
HANNAH ERNEY *et al.* } No. 9258, Equity Doc. 24. In Error.

Know all men by these presents that we, George W. Evans and Robert Boyd, of Washington, District of Columbia, are bound unto the above-named Hannah Erney and Charles A. Erney in the sum of one hundred —, to be paid to said Hannah Erney and Charles A. Erney, their executor or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seal and dated this 18th day of March, 1890.

76 Whereas the above-named complainants — on appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named complainants shall prosecute this said appeal to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

GEO. W. EVANS.
ROB'T BOYD.

Sealed and delivered in presents of—
CHARLES A. CLEMENTS.

Approved April 15th, 1890.
E. F. BINGHAM, *C. J.*

77 In the Supreme Court of the United States.

JOHN RIGGLES *et al.*, Appellants,
vs.
HANNAH ERNEY and CHARLES A. ERNEY, Appellees.
} No. 335. October Term, 1893.

It is hereby stipulated and agreed by the solicitors of the respective parties, appellants and appellees, that the property in square 199, in the city of Washington, which is the subject-matter of this suit, is and was at the institution of the said suit and at the date of the appeal of the value of twelve thousand dollars.

JAMES G. PAYNE,
Att'y for Appellants.
EDWIN B. HAY,
Att'y for Appellees.

78 [Endorsed:] Case No. 14,388. Supreme Court U. S. October term, 1893. Term No., 335. John Riggles *et al.*, app'ts, *vs.* Hannah Erney *et al.* Stipulation as to amount in controversy. Filed Jan'y 15, 1894.

Endorsed on cover: Case No. 14,388. Dist. of Columbia supreme court. No. 335. John Riggles, Mary Riggles, Mary A. Miller, Sarah A. Turton, Gertrude R. Wilson, *et al.*, appellants, *vs.* Hannah Erney and Charles A. Erney. Filed October 27, 1890.

JAMES H. M

IN THE

Supreme Court of the United States

OCTOBER TERM, 1893.

No. 335.

JOHN RIGGLES ET AL.

vs.

HANNAH ERNEY AND CHARLES A. ERNEY.

Brief for Appellant.

JAS. G. PAYNE,
For Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 335.

JOHN RIGGLES ET AL.

vs.

HANNAH ERNEY AND CHARLES A. ERNEY.

Brief for Appellant.

This is a suit brought in the supreme court of the District of Columbia to enforce specific performance of a parol contract relating to land.

STATEMENT OF THE CASE.

Thomas Riggles, Senior, having been twice married, left surviving him nine children, five by his first wife and four by the second. At the time of his death he was possessed of lot 7 and part of lot 8, in square 199, upon which stood the house in which he lived, and a large number of lots in square 179, then unimproved. By his last will and testament he directed that the house and premises in square 199 and the personal effects therein should remain in possession of his wife, Catharine, during her lifetime for the benefit of herself and their four children, and after the death of the

wife the said house and premises to remain in the hands of his executor, to be used by him for the benefit of the said four children until the youngest should be twenty-one years of age, provided that when the son Thomas (one of the said four children) should arrive at twenty-one years of age and when either of the daughters should be married, then, in either case, the benefit arising from said property should be exclusively for the use of such of the said daughters as might then be unmarried, and after the death of the wife and the said youngest child should attain the age of twenty-one years, then the house and premises to the said son Thomas, with the provision that such of the said sisters as might then be unmarried should be taken care of by the said son, and in case he should die before his said three sisters, then the house and premises to be sold and the proceeds divided equally among the said sisters or the survivors of them.

He further devised that the lots of ground in square 179 which might remain unsold and disposed of by the executor as most for the advantage of the wife and children before named and the amount that might be realized from any such sale, after paying necessary expenses of the wife and family, should be by the executor invested for the benefit of the wife and four children or as many of them as should remain unmarried, and after the death of the wife and the said children should have attained the age of twenty-one years the property remaining in said square unsold and any surplus remaining from the proceeds of sale should be divided between the testator's other children, John, James, and William, sons, and his daughters, Mary Ann Miller and Sarah Turton. (Record, p. 8.)

The will further provides that should the residue remaining from the sales in square 179 exceed the value of the property in square 199 the son Thomas and his said three sisters should receive from the larger proceeds such portion as would make their shares alike or equal to each other and to the shares of the other children.

At the time of making this will the property in square 179 was of several times the value of the other property; hence the provision of the will that the shares of the devisees of the smaller property should be enlarged from the other in such manner and to such extent as to make all the testator's children receive equal portions of the estate.

The executor subdivided square 179 and sold portions of the same. He died on the 9th of May, 1873, leaving sixty-two of the sublots unsold and subject to a deed of trust given by the executor to secure the sum of $7,000 borrowed by him.

The executor being dead, the indebtedness secured by the trust being overdue and pressing for payment, and there being some arrears of taxes and assessments upon all the property, it became necessary that there should be a substitution of trustee to execute the trusts, or that some other arrangement should be made for the settlement of the indebtedness and for carrying out the directions of the will. All of the children of the testator were then of lawful age, and of the three daughters by the second wife two remained unmarried.

Under these conditions the two sets of children and devisees came together and made an agreement that all of the lots in square 179 should be presently sold and the proceeds divided equally to the widow and the nine children, and that upon the death of the widow and death or marriage of the said daughters the property in square 199 should be sold and the proceeds also divided equally among all the children.

In pursuance of this agreement the lots in square 179 were conveyed to two trustees, one representing the children by the first wife, the other by the second, and were sold. After paying the expenses of sales, the trust indebtedness, with other charges, upon the property in both squares, and over $2,000 of indebtedness of the widow and her

daughters, the net proceeds were equally divided, the widow and the children receiving each over $3,000 in money.

About two years later the defendant Hannah married her co-defendant, Charles. Her two sisters and her brother died, leaving her the sole surviving child of the second marriage. The widow lived with her son-in-law, George W. Evans, from September, 1876, and received the rents of premises in square 199. She died in November, 1884.

The defendant refused to perform the agreement for the sale of the property in square 199 and equal division of the proceeds, and the original bill in this cause was filed, praying a decree for such specific performance. (Record, p. 2.)

The defendant Hannah made separate answer, denying the alleged agreement and invoking the aid of the statute of frauds. (Record, p. 8.)

The defendant Charles did not answer.

Replication was filed and proofs taken, and, the case coming on to be heard in the court below, the bill was dismissed on the ground that the provisions of the statute of frauds presented an insurmountable barrier to granting the relief on the case made. (Record, p. 29.)

Points and Authorities.

This case presents all the requisites necessary to establish the right of the plaintiffs to a decree for specific performance.

1st. The agreement is established in proof, is certain and equitable.

2d. The consideration was reasonable and sufficient to sustain the agreement.

3d. There was full performance by the plaintiffs of their part of the agreement, which so altered the relations of the parties that the plaintiffs cannot be restored to their original rights through other relief than specific performance.

The proof established the making of the agreement; not necessarily with formal verbiage or legal phrases like the parts of a deed, but a plain and certain agreement or promise by the defendant and her brother and sisters that the proceeds of the property in square 199 should be equally divided among all.

The testimony of John Riggles (Record, p. 11) describes the meeting of all the children and the widow in June, 1873, the presentation of the deed that had been prepared, the objection on the part of the children of the first wife, and the assurance on the part of the children of the second wife that the others should share alike in the proceeds of the house and lots at the death of the mother. He testifies that the children by the first wife would have refused to agree to sell any more of square 179 than sufficient to pay off the indebtedness unless the others would agree to the full equitable division of all the property, and that this was agreed to by all the heirs without any objection; that this agreement was made before the deed was signed, and that without it the first set of children would not have executed the deed.

George W. Evans (whose evidence is strongest in view of his relations to the defendant) testifies (Record, p. 13) that all of the children by both marriages were present, including the defendant Hannah; that John Riggles was selected to represent the children of the first wife, and himself those of the second wife; that the children by the first wife objected to executing the deed for sale of the lots in square 179 until they were assured that upon the death of the widow the other property would be sold and the proceeds be divided equally among all in order to make each heir's share equal on the final disposition of the estate (Record, p. 14). On cross-examination (Record, p. 15) he testifies that the agreement was distinct and positive. Though verbal, it was thoroughly understood and consented to by all, including the defendant Hannah; that, as he represented the children by

the second wife, he consulted with her, explaining the terms of the deed, read the will to her, and asked her, as well as the others, if she thoroughly understood and consented to selling the property; that she was satisfied, and so expressed herself.

Sarah A. Turton testifies to being present at the meeting (Record, p. 16), and that the defendant Hannah was present during the whole of the time; that the heirs of the first wife objected to share equally with the second children as to property in square 179 without an understanding as to the remaining property; that the trustee on the part of the children of the second wife explained that there should be equal division of the homestead after the mother's death, and that appeared to give satisfaction to all present. She further testifies that there was a full discussion about the division of the proceeds of the sale of both classes of the property; that it was explained by Mr. Evans; that she believes all thoroughly understood it, and that there was no dissent or objection on the part of any one.

In contradiction of this testimony we have the unsupported statement of the defendant Hannah, who testifies that there was no agreement made or suggested touching the sale of the property in square 199.

She does testify, however, that she was present at the meeting in June in the same room with the others, and that George W. Evans represented herself and her sisters. To use her own language (Record, p. 21), he was her representative in this transaction and acted for her in the premises.

This leaves the testimony in the proportion of three to one in number of witnesses, and it will be noted as to the testimony of the defendant Hannah that she is distinctly contradicted by Evans, who was her representative.

But the testimony of the plaintiffs is corroborated by the fact that the alleged arrangement was a reasonable and equitable one. There was no necessity for a sale of the en-

tire property in square 179 at that time, or if sold there was no necessity for an immediate or equal division of the proceeds. This feature will be further considered upon the question of consideration.

As to the necessary extent and character of proof, it is sufficient if on the whole evidence it is reasonably certain that the parties agreed. (Neale *vs.* Neale, 9th Wallace, p. 1.)

Upon the question of the sufficiency of consideration for making the agreement, the direction of the testator expressed in his will that ultimately there should be such a division of the proceeds arising from sales of all the property as to make the share of all the children alike or equal to each other, is of itself a sufficient consideration.

Apart from this, the adequacy of the consideration will readily appear if the conditions existing at the time be considered. All of the parties were of lawful age. The widow was entitled to the possession of the property in square 199 during her lifetime for the benefit of herself and her unmarried daughters, of whom there then remained two—Maria (since deceased) and Hannah, the defendant. Upon the death of the widow that property was to go to her son, Thomas, charged with the care of the daughters remaining unmarried; but if Thomas died before her, then upon her death that property was to be sold and the proceeds equally divided among the said daughters. That property was then worth, say, $6,000 or $8,000, while the property in square 179 was then worth (and was soon after sold for) over $40,000. The latter property was incumbered by a mortgage debt of $7,000 and interest and some arrears of taxes, &c. It could have been sold, the incumbrances and charges paid, and over $30,000 invested. Only a portion of the income of this investment, at the lowest rate of interest then prevailing, would have been requisite for the support of the widow and her unmarried daughters. The rest would have been added to the principal. Then, upon the widow's death the property in square 199 would have

been sold, and, in the manner specified in the will, the whole estate would have been equally divided among all the children, so that the defendant would have received from all the property no more than any other of the children of the testator. This was to be the ultimate result, and the desire to anticipate the division in part was a reasonable and sufficient consideration for agreeing to a similar disposition in the future as to the remainder.

That there was full performance on the part of the plaintiffs is not disputed. All that the agreement which we set up required them to do was promptly and completely performed.

It is probably unnecessary to cite authorities in support of the doctrine that part performance of a parol contract will take that contract out of the statute of frauds. The general rule is stated in Maddock's Chan., vol. 1, p. 301:

"If it be clearly shown what the agreement was and that it has been partly performed—that is, a part execution of the substance of the agreement, which would not have been done unless on account of the agreement—the agreement will be decreed to be specifically performed."

The same rule is laid down in Roberts on Frauds, 153; 2nd Story's Eq. Jur., sec. 759, and 3d Pomeroy Eq. Jur., sec. 1405.

Many of the cases in which this doctrine has been established or recognized by courts both of England and of America are collated in the notes to Lester *vs.* Foxcroft, 1st Lead. Cas. in Eq., 1030 (4th Am. ed.).

This Court has settled and recognized this rule in several cases.

Caldwell *vs.* Carrington's Heirs, 9th Peters, p. 89, was the case of a parol agreement to exchange lands, completely performed by Carrington by conveying to Williams the land he agreed to give to Williams in exchange. Williams refused

to perform his part, and, he being dead and having sold and conveyed portions of the land to others, the bill was brought against the heir of Williams and the grantees of the portion sold, for a decree compelling them to convey the said lands to the complainant. The Court held that although the statute of frauds avoids parol contracts for land, yet the complete execution of the contract in this case by Carrington prevents the operation of the statute.

In Neale *vs.* Neale (9th Wallace, p. 1.) the bill as amended, alleged that the defendant promised to give a lot of land to the complainant Mary in consideration of her marriage with her co-complainant. They did marry, and, the defendant refusing to perform, the bill was filed, proof taken, and a specific performance decreed. In this Court the decree was affirmed, and I quote from the opinion as follows:

"Was this gift in question made to Mary H. Neale and her children, and has the condition on which it was given been performed so as to make it inequitable for the donor to escape from his engagement? The evidence is in many respects conflicting and contradictory. It is enough to say, for the purpose of this suit, that on the whole evidence it is reasonably certain that John E. Neale agreed to give to Mary Hamilton, who was about to marry his son, in furtherance of the marriage, the lot in controversy for the benefit of herself and her children and for a home for the family if with her means a suitable dwelling-house was erected on it, and that this has been done."

In Williams *vs.* Morris, 95th U. S., p. 444, specific performance of the parol contract alleged was not decreed for the reason that there was no satisfactory evidence to prove such part performance as would take the case out of the statute. The Court, however, in the opinion in that case expressly recognizes the general rule that part performance, if established, will take the parol agreement out of the operation of the statute.

In Bigelow *vs.* Armes, 108th U. S., p. 9, there was no

written contract and no memorandum sufficient to support a bill for specific performance, but the terms of the contract were held to be established by the evidence, with full performance by the plaintiff and part performance by the defendant, and specific performance was decreed.

In almost every State of this Union the rule is well settled that in equity part performance takes a parol agreement out of the operation of the statute of frauds. (Am. notes to Lester *vs.* Foxcroft, 1st Lead. Cas. in Eq., 1042, 4th Am. ed.)

8 Am. and Eng. Encyclop., 739.

In Maine and Massachusetts for a time the equity powers of the courts were limited by statute, but have since been enlarged, and recent cases follow the rule I have stated.

Potter *vs.* Jacobs, 111th Mass., p. 32.

Green *vs.* Jones, 76th Me., p. 563.

Woodbury *vs.* Gardner, 77th Me., p. 68.

In Rhodes *vs.* Rhodes, Sandf. Ch., 279, two brothers, Andrew and Henry, owned and occupied a farm which was devised to them by their father as tenants in common. In 1828, Andrew, becoming incapacitated and requiring care, agreed in parol with Henry that the latter should provide for and attend to him and should have all of Andrew's real and personal property in return. Henry performed on his part until Andrew died, when his heirs-at-law demanded his half of the land. The Court held that the contract was made as stated in the bill; that it was certain in terms and reasonable; that performance on the part of Henry was not disputed; equity therefore would decree the performance.

In Farwell *vs.* Johnston, 34th Mich., p. 343, the complainant agreed with the defendant to release to him her dower and homestead right, he agreeing to convey to her two acres of land when certain incumbrances on the property conveyed to him were cleared. This agreement was in parol. The complainant performed by uniting in a deed

to the defendant releasing her dower and homestead right. The incumbrances on the property conveyed to the defendant were cleared, but, he refusing to convey the two acres of land, the complainant filed her bill for specific performance which the Court decreed on the ground that there was a part performance which took the agreement out of the statute.

In Malins *vs.* Brown, 4th Comstock, p. 404, the plaintiff was purchasing from one Ward forty acres of land. Munroe (defendant's testator) held a mortgage on this and other land. The several parties made a parol agreement that $700 of the purchase-money should be paid to Munroe to apply on his mortgage and he to release the forty acres. The $700 was paid and release of the forty acres demanded, but refused. The court held that to avoid the agreement on the ground of the statute would be to make the statute an instrument of fraud; also that the repayment of the money paid would not indemnify the plaintiff. The justice delivering the opinion says:

"There is a valuable consideration in the way of benefit bestowed and disadvantage sustained by the complainant. Malins made it a condition that the property should be cleared and the mortgagee agreed to release on terms that were complied with."

In Bennett *vs.* Abrams, 41st Barb., p. 620, the defendant, Abrams, owned three parcels of land, subject to a mortgage to one Ladd to secure $1,300. The plaintiff owned two lots of land. They made a parol agreement to exchange, the plaintiff to convey the two lots and deliver a bond with mortgage on one for $625, the defendant to convey the three lots and to procure or cause the mortgage to Ladd to be satisfied and discharged of record. The deeds were mutually delivered and the $625 bond and mortgage executed and possession taken. The mortgage to Ladd was not satisfied or discharged, and on bill filed for its specific

performance the statute of frauds was pleaded. The court decreed the performance on the ground that the plaintiff had fully performed his part and the defendant had accepted and retained all the advantages to be derived from such performance, and that it did not lie with him after that to refuse performance on his part and urge the invalidity of the agreement.

In Murphy *vs.* Whitney, 69th Hun., p. 573, the latest case I find upon this subject, there were seven tenants in common, brothers and sisters, one only of whom was married, and he had one son. All of these brothers and sisters entered into a parol agreement that the property should be held in common for the use of all living; that on the death of any one his or her interest should vest in the survivors until the last, on whose death it should pass to the plaintiff, the son of one of these brothers. It became necessary for him to file a bill for specific performance, and the court held that, although the agreement was in parol, the part performance took the case out of the statute and decreed specific performance.

The following are some, among many other, cases following the rule I have stated:

Watkins *vs.* Watkins, 24th Ga., 404. (This was a case of a family agreement.)
Howe's Heirs *vs.* Rodgers, 31st Tex., 219.
Warren *vs.* Warren, 105th Ill., 568.
Parkhurst *vs.* Van Cortland, 14 Johnson, 15.
Neale *vs.* Neale, 1 Keen, 68.
Seaman *vs.* Ascherman, 51 Wis., 678.
W. Va. Oil, &c., Co. *vs.* Vinal, 14 W. Va., 637.

In the argument below one contention of the defendant was, that the bill seeks to change and modify by parol evidence the terms of the conveyance to Riggles and Evans of lots in square 179 (in trust), and that such evidence cannot be considered. In this the defendant misconceived the pur-

pose and object of the bill. It is not sought to change any of the recitals or terms of that deed. It was the performance of the parol agreement on the part of the plaintiffs. It does not contain the agreement of the parties, but was a step in pursuance of that agreement and its performance. The sale by the trustees and the division of the proceeds made up the complete performance of the agreement on the part of the plaintiffs.

Another proposition advanced by counsel for the defendant is that because the defendant's interest in the homestead as it stood at the date of the agreement has been apparently enlarged by the death of her brother and sisters, she should not now be held to the performance of the agreement. This proposition, we submit, is completely answered by a reference to the position of the defendant and the manner in which she acquired the rights she now asserts in this property. As to all of the interests which have come to her by reason of the death of her brother and sisters, she stands in their place and takes the interest of which they died possessed, subject to all the burdens which they had undertaken in the premises. Especially is this so in view of the fact that she herself was a party with them to the agreement in question, and assumed a like burden and obligation with them.

There are numerous cases applicable to this point in addition to supporting the rule generally.

A vendee who has fulfilled his contract of purchase may obtain a decree for specific performance against parties who with notice of the equities succeed to the interests of the vendor. (Laverty *vs.* Moore, 33d New York, 658.)

The following are some of the cases in which specific performance of parol agreements, performed in part, has been

decreed against parties acquiring the land or interests in the land after the making of the agreement:

Van Dyne *vs.* Vreeland, 3rd Stockt., N. J., 370.
Gupton *vs.* Gupton, 47th Mo., 37.
Twiss *vs.* George, 33rd Mich., 253.
Davidson *vs.* Davidson, 2d Beasley, N. J. S. C.
Caldwell *vs.* Carrington's Heirs, 9 Peters, 89.

I have cited a few from a large number of American authorities sustaining and applying the rule that part performance of a parol agreement relating to land takes that agreement out of the statute of frauds.

It will be difficult to find a stronger case than the one now presented to the Court. To allow the defendant Hannah to retain the benefit received by her from the plaintiffs' performance on their part and refuse to perform it on her part will be a serious wrong and injustice.

I submit that the court below should have decreed the sale of the property in square 199 and distribution of the proceeds, as prayed in the bill of complaint.

JAS. G. PAYNE,
For Appellants.

FILED.
MAR 29 1894
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

October Term, 1893.

No. 335.

JOHN RIGGLES *et. al.*

vs.

HANNAH ERNEY AND CHARLES A. ERNEY.

BRIEF FOR APPELLEE.

EDWIN B. HAY,
For Appellee.

JOHN F. SHEIRY, PRINTER, 423 D ST.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 335.

JOHN RIGGLES *et al.*

vs.

HANNAH ERNEY and CHARLES ERNEY.

BRIEF FOR DEFENDANTS.

In this suit, brought for the specific performance of a parol contract relating to land, consideration must be given to the following items from the will of Thomas Riggles, who died December, 1863, having made his last will and testament on the 30th day of October, 1863, which is fully set forth in original bill of complaint and in the statement of the case by the appellant:

"I will and devise that my house and premises which I now occupy, situated in the city of Washington in the District of Columbia, being lot numbered seven (7) and part of lot numbered eight (8) in square numbered one hundred and ninety-nine (199) together with all the household and kitchen furniture and other personal property that may be on said premises at the time of my decease shall be and remain in the possession of my wife Catherine Riggles during her lifetime for the benefit of herself and our four children named Thomas, Catharine, Maria, and Hannah Riggles, respectively; and after the death of my said wife, the said house and premises to remain in the hands of my executor hereinaf-

ter named, to be by him used for the benefit of the above-named four children until the youngest one of them surviving shall become twenty-one years of age; provided that when the said Thomas shall arrive at twenty-one years of age, and when either of the said daughters shall be married, then, and in either such case, the benefit arising from said property shall be exclusively for the use of such of said daughters as may then be unmarried; and after the death of my said wife, and the said youngest child shall attain the age of twenty-one years, then, the said house and premises I will and bequeath unto my son Thomas Riggles, with the express provision that such of my aforenamed daughters as may then be unmarried shall be taken care of by my said son Thomas, and in case the said Thomas Riggles shall depart this life before the said three sisters then the said house and premises to be sold, and the proceeds to be divided equally among the said three sisters or the survivors of them. Item: I will and devise that all the lots of ground belonging to me situate in square numbered one hundred and seventy-nine (179) in said city of Washington which may remain unsold and disposed of by my said executor at such time and in such manner as his discretion may dictate as most for the advantage of my wife and children aforenamed, and the amounts that may be realized therefrom, after paying all necessary expenses of my wife and family, be by him invested at his discretion for the benefit of my said wife and four children or as many of them as shall remain unmarried; and after the death of my said wife, and our four children shall have attained the age of twenty-one years if any of said property in square one hundred and seventy-nine remains unsold, and also any surplus that may then remain from the proceeds of said square one hundred and seventy-nine, to be divided between my other children, John, James, and William Riggles, and my daughters, Mary Ann Miller and Sarah Turton; and it is farther my wish and desire that should the residue remaining from the sale of my lots in square one hundred and seventy-nine be more than the value of said house and premises I now occupy in square one hundred and ninety-nine, then, and in that case, I wish and devise that my son Thomas and my said daughters Catherine, Maria, and Hannah Riggles shall receive from the proceeds of square one hundred and seventy-nine, such portion of such proceeds as make all

their shares alike or equal to each other and to the shares of my other children."

Under this provision of the will, the widow was entitled to the possession of the homestead in square 199 for herself during life and her unmarried daughters, the remainder to Thomas Riggles, charged with the care of the unmarried daughters. In the event of Thomas' death prior to the mother the property was to be sold at her death and the proceeds to be divided between the daughters.

Thomas Riggles, jr., died December 27, 1883. Catharine Riggles, widow, died November, 1884. Hannah Riggles Erney, by the death of her brother and sisters, is the sole survivor of the children of the second wife and entitled to the said homestead in square 199.

Square 179 was charged with the maintenance and necessary expenses of the said wife and four children during her life, and after her death the children until the youngest should become of age. The executor was given the power to dispose of all of 179, if, in his discretion, it became necessary to apply proceeds to the use of the said children of the first wife.

The executor had failed to provide, as the will directed, for the support of the widow and daughters and for the payment of taxes and assessments upon the whole realty.

This condition of affairs existed when the idea occurred that all the parties being of age, and to prevent a foreclosure of a deed of trust upon 179, trustees in the family might be selected to make sale of said property and pay off said indebtedness, hence the meeting of the parties intended for an alleged family arrangement, at which time a deed of trust was made for the purpose of a sale of 179, and after paying the proper charges to the widow and children by the first wife, then to divide the residue *pro rata* among all the heirs.

In the preamble of this deed of trust care was taken to introduce many whereases, explanatory of every reason why

the deed should be made. Especially, though, that part in the following words:

"And whereas, the said parties of the first part are desirous that the remainder of the said square shall be sold as speedily as the same may reasonably be done, for the purpose of paying off the said trust indebtedness and the taxes and assessments upon said property and upon other real estate left by said testator, and for the further purpose of an equitable division of the net proceeds of such sale or sales among the widow and children of the said Thomas Riggles."

The deed was made June 11, 1873, and was an instrument greatly to the advantage of the parties complainant in this cause.

They could not foretell the period of life for the mother. The executor could have disposed of all of 179 in his discretion had such been needed for maintenance of the mother and children. Therefore a sale and division at this time, in 1873, was favorable to the heirs of Thomas Riggles by his first wife.

It is alleged and has been sought to be proven that the defendant, Hannah Erney, together with the others of her set of heirs, entered into a parol agreement to permit the homestead lot in square 199 to be sold upon the death of the mother and divided *pro rata* among all the heirs of Thomas Riggles in consideration for the sale of square 179 and a division of the proceeds under the trust of 1873.

The agreement is absolutely denied and the statute of frauds pleaded.

To take the matter out of the statute and decree specific performance as prayed the agreement must be established, not *any* agreement, but *the agreement* as set forth in the bill.

The complainants say: "The proof establish the making of the agreement, not necessarily with formal verbiage or legal phrases like the parts of a deed, but a plain and certain agreement or promise by the defendant."

As to the proof depended upon Mr. Riggles' complainant and trustee speaks of the objection of the children of the first wife and *the assurance of the children* of the second wife and that an equitable division was agreed to by all the heirs without any objection—a mere conjecture on his part.

Mr. Evans, also a complainant and trustee, states: "though verbal, it was understood and consented to by all—that *he explained the terms of the deed* and the defendant thoroughly understood and consented to selling the property. This the defendant admits; also, that the deed, which is the 'deed of trust,' was the only matter discussed and that in that Mr. Evans represented 'our side.'" She testifies that there *was no agreement made or suggested touching the sale of the property in square 199.*

Sarah Turton, another complainant, states that "she believes all thoroughly understood it" and "that appeared to give satisfaction to all present." The whole evidence, therefore, is not reasonably certain that this defendant agreed to part with any interest she might have in the square 199 property.

In Neale *vs.* Neale (9th Wallace, p. 91) "the evidence," said the court, "is in many respects conflicting and contradictory." In this case it is clear to be seen that in any assents to the arrangements referring to the deed of trust each witness is corroborated and upon that there is nothing contradictory, but upon the understanding of the defendant in the premises as to some agreement there can be no certain testimony.

The alleged contract by parol must be first certainly proven before the question of part performance becomes an ingredient in a cause to take this agreement out of the operation of the statute.

POINTS.

First. There was no agreement between the parties.

Second. If there was, it was void under the Statute of Frauds.

Third. That the share of the proceeds of square 179, received by defendant, was not in consideration of a parol agreement to convey the "homestead" in square 199.

Fourth. That the payment of the proceeds from sale of lots in square 179 to the defendant, is not such a part performance as to take the case out of the Statute of Frauds.

Fifth. That under the will, square 179 was charged with the maintenance of this defendant from 1863 to 1877, fourteen years.

Sixth. That the evidence in support of agreement is not *clear and definite and certain.*

Seventh. That by death of the parties to original alleged agreement the conditions are materially changed as to the defendant's interest.

AUTHORITIES.

The Statute of Frauds in Maryland requires written evidence of the contract, or a court cannot decree performance. The words of the statute are, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

Barry *vs.* Coombe, 1 Peters, 640.

And to authorize a decree for the specific performance of a parol agreement within the statute, on the ground of part performance, it is indispensable, not only that the acts which are alleged to be part performance, but the contract itself, as stated in the bill, should be established by clear and definite proof.

Smith *vs.* Crandall, 20 Md., 482, in which reference is made to 3 Md., 490, that "where a party claims to take the case out of the statute of frauds, on the ground of part performance of the contract, he must make out by clear and satisfactory proof the existence of the contract as laid in the bill, and the

act of part performance must be of the identical contract set up. It is not enough that the act is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill."

In 4 Md., 459, 462, Mundorf *vs.* Kilbourn, the court says: "We need not multiply authorities to show that in cases for specific performance the complainant must establish the *very* contract set up in the bill, and that all acts of part performance relied upon to take the case without operation of the statute of frauds, must be clear and definite, and refer exclusively to the alleged agreement."

In the 5 Md., 35, the court said: "No rule is better established than that every agreement, to merit the interposition of a court of equity in its favor, must be plain, just, reasonable, *bona fide*, certain in all its parts, mutual, etc. And if any of these ingredients are wanting, courts of equity will not decree a specific performance."

Wordsworth *vs.* Maning, 4 Md., 59.
Crane *vs.* Gough, 4 Md., 306; 3 Md., 119.
Waters *vs.* Howard, 8 Gill., 275.
Hall *vs.* Hall et al., 1 Gill., 383.
Owings *vs.* Baldwin and Wife, 8 Gill, 347.
Stoddert *vs.* Bowie, 5 Md., 18.
Allen *vs.* Bourke, 2 Md., 534.
Beard *vs.* Linthicum, 1 Md. ch., 345.
Hopkins *vs.* Roberts, 54 Md., 316.

Evidence of knowledge of agreement must be certain.
2 Starkey on Evidence, 598.

The defendant denies positively any agreement whatever to dispose of the homestead, and there is only uncertain proof that she was aware of such agreement. Those who testify, state that it was talked of loud enough for her to hear it, but concerning her understanding of it they only conjecture.

An agreement must be unequivocally proven by the complainant; the defendant cannot supply such an essential want.

King's Heirs *vs.* Thompson and Wife, 9 Peters, 204.

The contract must be clear and definite, and the acts done should be equally clear and definite, and solely with the view of the agreement being performed.

Jos. Shepherd *vs.* Mary Bevin, 9th Gill, 32.
Knoll *vs.* Harvey, 19 Wis., 99.
Lester *vs.* Kinne, 37 Conn., 9.
Jacobs *vs.* Peterborough R. Co., 8 Cush., 223.
Purcell *vs.* Miner, 4 Wall., 513.
Wheeler *vs.* Reynolds, 66 N. Y., 227.
Pike *vs.* Peters, 71 Ala., 98.

A court should not decree a specific performance of a parol contract for the conveyance of land even where there is a preponderance of testimony in favor of the existence of such a contract, if either the making of the same or its essential terms are left in doubt.

Knoll *vs.* Harvey, 19 Wis., 110;
refers to—
Horn *vs.* Sudington, 32 Wis., 73.
Blanchard *vs.* McDongal, 9 Wis., 167.
Turner *vs.* Gibney, 24 Wis., 180.

If the terms of the agreement are uncertain or ambiguous, or not made out by satisfactory proof, a specific performance will not (as, indeed, in principle it should not) be decreed, for a court of equity ought not to act upon conjectures.

Story's Eq. Jurisprudence, sec. 764.
Colson *vs.* Thompson, 2 Wheaton, 336;

In which Mr. Justice Washington said: "The contract, which is sought to be specifically executed, ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the

contract be vague or uncertain or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy." Refers to—

Elliot *vs.* Kele, 1 Vern., 406.
Bromley *vs.* Jefferies, 2 Vern., 415.
Emery *vs.* Wase, 5 Ves., 849.

The admissions of the defendant who depends upon the statute are immaterial, for he throws it upon the plaintiff to show a complete written agreement. It cannot be thrown upon defendant to supply the want of agreement.

Story's Eq. Juris., 757.
Sackett *vs.* Williamson, 37 Ms., 388.
Anter *vs.* Willis, 18 Iowa, 405.

The payment of purchase-money or a considerable part of it is not such a part performance as took case out of statute.

Cappy *vs.* Hixon, 29 Ind., 522.

If nothing has been done but the alleged payment of the purchase-money, that can be recovered back, and thus the purchaser be placed in *statu quo*.

Cappy *vs.* Hixon, 29 Ind., 522;

refers also to—

Eastburn *vs.* Wheeler, 23 Jno., 305.
See Story's Eq. Jurisprudence, secs. 760, 761, 762.
Climare *vs.* Cook, Sch, and Lefr., vol. 1, p. 40 and 41.
Cronk *vs.* Trimple, 66 Ill., 428.
Anna Berta Lodge *vs.* Severton, 42 Tex., 18.
Horn *vs.* Sudington, 32d Wis., 73.
Barnes *vs.* Boston R. R. Co., Bo. Mass., 388.

In the testimony there is no proof of that clear and decisive character which should govern a court, in the exercise of its discretion, to decree a specific performance.

In Gosse *vs.* Jones, the court said: "Where a contract for sale of land rests in parol, it must clearly appear that a contract of sale has been made. Its terms must be clearly proved, and it must appear that they have been relied upon and performed by the party seeking the enforcement of the contract, in order to entitle him to a decree for specific performance."

Hartwell *vs.* Black, 48 Ill., 301.

That specific performance of an agreement cannot be decreed if the conditions are altered.

In Waters *vs.* Howard, 8 Gill., 262, upon specific performance, the court says, in referring to the contract set out in the bill; "Now, this contract, if enforced at all, as is said in the cases, is to be enforced *ex vigori*, and with unmitigated severity." It must be carried into execution in all its points, etc.

If this agreement be sufficiently proven to take it out of the statute, the position of the parties has materially changed—by death. The distributive shares have changed from a less to a larger proportion.

And where there is anything by reason of the change of circumstances in regard to the property that makes it unconscionable that the party should have execution of the contract, a court of equity will withhold its aid.

Inglehart *vs.* Vail, 73 Ill., 63.

But although the answer confesses the parol agreement (which in this case it does not), if it insists, by way of defense, upon the protection of the statute, the defense must prevail as a competent bar.

Blagden *vs.* Bradbear, 12 Ves., 461.
1 Story's Eq. Juris., 3, 757.
Luckett *vs.* Williamson, 37 Mo., 388.

If so important an ingredient in the verbal agreement as to the disposal of the homestead should have been in existence,

why was it omitted from the preamble of the trust and from the trust itself? This subject is discussed in one of the latest cases of the court of appeals of Maryland.

In John T. Williams and Wife *vs.* Shipley, 67 Md., 373, appeal from circuit court of Frederick, Md., opinion by Alvey, Chief Justice, in which he says: "There is no doubt that a family arrangement was entered into for the settlement of the former suit in regard to the conflicting claims, assisted by the deed and the will; but the question here is, what was really intended in that compromise arrangement? *But there is nothing disclosed in the terms of the written agreement to indicate in the slightest degree that any arrangement or promise on the part of Mrs. Henry to include Mrs. Williams in an equal distribution of the property formed an ingredient in this family arrangement. If such was in fact the arrangement, why was it not expressed? Why should so important a term in the settlement have been left dependent upon the uncertainty of human memory when all other terms of the settlement were reduced to writing? There has been no sufficient answer given to this question.*"

See also Mundorf *vs.* Kilbourn, 4 Mo., 464.

Referring now to cases in point that have been considered by this court written memoranda bearing upon the transaction have appeared in almost every instance.

Mr. Justice Grier, in Purcell *vs.* Coleman, 4th Wallace, 513, in his opinion, says: "A mere breach of a parol promise will not make a case for the interference of a chancellor. When he requests a court to interfere * * * he should be held rigidly to *full satisfactory* and undubitable proof of the contract and of its terms. Such proof must be *clear*, definite, and conclusive and must show a contract leaving no *jus deliberandi* or *locus pœnitentiæ*. It cannot be made by mere hearsay or evidence of the declarations of a party to mere strangers to the transaction in chance conversation, which the witness

has no reason to recollect from interest in this subject-matter which may have been imperfectly heard or inaccurately remembered, perverted, or altogether fabricated testimony, therefore impossible to be contradicted.

In Williams *vs.* Morris, 95 U. S., 444, even though written receipts were introduced to identify parties to the property, the testimony was not sufficient to prove part performance.

In Bigelow *vs.* Armes, 108 U. S., page 9, while there was no written contract, yet the facts were such that left no "*jus deliberandi*," and showed such part performance that took the case out of the operation of the statute. There is, however, a written memorandum in this case which describes the property and states the consideration—signed by the parties to the transaction.

In Beckwith *vs.* Talbot, 95 U. S., the defendant in that action was charged on a memorandum in which his name was not found, but letters were produced in evidence which proved a sufficient ratification of the memorandum to comply with the statute and the court below so held and was sustained by this court.

In Grafton *vs.* Cummings, 99 U. S., page 100, even though there are memoranda and writings, yet this court held them defective and not sufficient to take the case from the operation of the statute.

Therefore in this cause, as the agreement set forth is specifically denied and there is not sufficient parol testimony to sustain it with the certainty required to warrant the interference of a court of equity, the decree below should be affirmed and the bill be dismissed.

EDWIN B. HAY,
for Appellee.

Supreme Court of the United States.

MICHAEL MORAN, PETER CAHILL, CYNTHIA CAHILL and JARVIS MASTERS,
Plaintiffs in Error,

against

FRANK D. STURGES, Receiver of SCHUYLER'S STEAM TOWBOAT COMPANY,
Defendant in Error.

Gentlemen.—Please to take notice that upon the return to the Writ of Error herein and upon the affidavit of Joseph F. Mosher, sworn to April 19th, 1893, a copy whereof is herewith served upon you, we shall move this Honorable Court on Monday May 1st 1893 at the opening of the Court or as soon thereafter as counsel can be heard, that this cause be advanced and set down for argument on such early date as the Court may direct, in the Term of October, 1893, and for such other or further relief in the premises as may be just.

Dated April 19th, 1893.

Yours, &c.,

CARPENTER & MOSHER,
Attorneys for Plaintiffs in Error.

To FRANK D. STURGES, Esq.,
Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

MICHAEL MORAN, PETER CAHILL, CYNTHIA CAHILL and JARVIS MASTERS,
Plaintiffs in Error,

against

FRANK D. STURGES, as Receiver of SCHUYLER'S STEAM TOWBOAT COMPANY,
Defendant in Error.

STATE OF NEW YORK, *City and County of New York*, } ss.:

JOSEPH F. MOSHER, being duly sworn, says: I am one of the attorneys and of counsel for Michael Moran, Peter Cahill, Cynthia Cahill and Jarvis Masters, plaintiffs in error, in the above-entitled cause; this writ of error is brought to review a judgment of the Supreme Court of the State of New York, rendered and entered upon remittitur from the Court of Appeals of said State enjoining and restraining the plaintiffs in error and others named, from prosecuting certain suits in Admiralty in the United States District Court for the Eastern District of New York.

The facts leading up to the entry of said judgment are as follows:

On July 31, 1891, upon the application of the Trustees of Schuyler's Steam Towboat Company, a corporation created and organized under the laws of the State of New York, which application was made pursuant to the statutes of said State, a Justice holding a Special Term of the Supreme Court of said State signed an order requiring all persons interested to show cause before a Referee

therein named, why said corporation should not 7
be dissolved, and appointing Frank D. Sturges, of the city of New York, the defendant in error herein, temporary Receiver of the property of said corporation; and it was further directed in and by said order, that before entering upon his duties as such Receiver, the said Receiver should execute in due form of law, his bond, in the penal sum of fifty thousand dollars to the People of the State of New York, with sureties conditioned for the faithful execution of his trust and for his due accounting for all property and money, which would come into his hands as such Receiver; and that said bond should be filed in the office of the Clerk of 8
the County of Albany.

Said petition for dissolution was filed, and said order was entered in the office of the Clerk of the County of Albany, being the Clerk of the Supreme Court of the State of New York, for said county, on August 1st, 1891.

The Receiver's bond in form according to the terms and provisions of the aforesaid order, was executed, and was approved by a Justice of the Supreme Court of the State of New York, on August 3d, 1891, and it was filed in the office of the Clerk of the County of Albany, as required by the aforesaid order, on August 4th, 1891.

Meanwhile, and on August 1st, 1891, Michael 9
Moran, one of the plaintiffs in error herein, duly filed in the District Court of the United States for the Eastern District of New York in admiralty, his several libels against the steam towboats "Bello" and "Syracuse," which were then within said District to recover for certain services rendered by certain tugboats owned by him individually, to and for said towboats respectively. Process according to law and the practice of the said District Court thereupon duly issued to the United States Marshal for the Eastern District of New York, who

upon the same day seized and took into his possession the said steam towboats, "Belle" and "Syracuse," under said processes, affixed his notice of seizure thereto, and continued in sole and exclusive possession of said vessels until and after the making of the injunction order and the sale of said vessels as hereinafter set forth.

On August 3rd, 1891, the said Michael Moran, individually, the said Michael Moran and Peter Cahill as co-owners of certain tugs, the said Michael Moran, Peter Cahill and Jarvis Masters as co-owners of certain other tugs, and the said Michael Moran, Jarvis Masters and Cynthia J. Cahill, as co-owners of certain other tugs (all said persons being plaintiffs in error herein), duly filed in the District Court of the United States for the Eastern District of New York in admiralty, their libels respectively against the steam towboats "Vanderbilt," "Jacob Leonard" and "America," which were then within said district, to recover for the like services rendered by their respective tugs to said towboats respectively, and also filed libels against the steam towboats "Belle" and "Syracuse" on like claims other than those upon which said Michael Moran, individually, had filed his libels on August 1st, 1891. Process according to law and the practice of said District Court, thereupon duly issued to the United States Marshal for the Eastern District of New York, who upon the same day seized and took into his possession, under said processes, the said steam towboats "Vanderbilt," "Jacob Leonard" and "America," and also attached under such new process, the steam towboats "Belle" and "Syracuse," affixed his notice of seizure to each and every of said steam towboats, and continued in sole and exclusive possession of all said vessels until after the making of the injunction order and the sale of said vessels as hereinafter set forth.

When the said steam towboats "Belle," "Syr-

acuse," "Vanderbilt," "Jacob Leonard" and "America" were attached and seized by the Marshal of the Eastern District of New York, under the aforesaid processes, they were not, nor was any of them, in the possession or under the control of the Receiver nominated by the State Court, to wit, Frank D. Sturges, defendant in error, nor had said Receiver up to that time made any attempt to take actual possession thereof. 13

Said Receiver took no steps to get possession of said steam towboats until August 4th, 1891, when for the first time he visited said steam towboats for the purpose of taking possession, claiming that they were the property of Schuyler's Steam Towboat Company, and found the marshal's keepers aboard and the marshal's notices of seizure attached to all of them. 14

Afterwards, and on November 11, 1891, the marshal still being in possession of said steam towboats, under and by virtue of the aforesaid processes, the said Frank D. Sturges, Receiver as aforesaid, and defendant in error herein, presented to the Supreme Court of the State of New York, in the county of Albany, his petition setting forth among other things, the proceedings had towards the dissolution of the company; the filing of libels by the plaintiffs in error, the seizure of the libelled towboats, and the fact that the marshal was in possession when the Receiver visited them for the purpose of taking possession, and also setting forth the filing of several other libels by various parties, and that said libels, including the libels filed by the plaintiffs in error, involve the question of jurisdiction of the District Court over said vessels when the libels against them were filed, and when they were attached by the marshal, and praying that said libellants, including the plaintiffs in error, and their attorneys and proctors, be restrained and enjoined from further prosecuting said libels in said District Court of the United States, and from tak- 15

16 ing any proceedings under said libels, by motion or otherwise, for the condemnation and sale of the libelled steamboats, or any of them.

Such proceedings were thereupon had, that upon notice and after argument, the prayer of the petitioner and defendant in error herein, was granted, and an order was made at a Special Term of the Supreme Court of the State of New York, dated December 7, 1891, and entered February 8, 1892, enjoining and restraining the plaintiffs in error herein and others named, from taking any further proceedings in the actions in the United States District Court, for the Eastern District of New York, in which
17 libels had been filed by or on behalf of said parties, against the steamboats "America," "Belle," "Syracuse," "C. Vanderbilt," and "Jacob Leonard," and from further prosecuting or taking any action whatever under said libels and each and all of them looking to the condemnation and sale of said steamboats or any of them.

Thereupon the plaintiffs in error herein duly appealed from said order or decree according to the practice of the Supreme Court of the State of New York, to the General Term of said Court in the Third Judicial Department, and after argument said order or decree was affirmed with costs, by order dated July 2, 1892.

18 Thereupon the plaintiffs in error duly appealed from said order of affirmance, according to law and the practice of the Courts of the State of New York, to the Court of Appeals of said State, being the highest Court in the State of New York in which a decision can be had, and after argument, said order appealed from was affirmed, and according to law, said Court sent down the remittitur to the Supreme Court, and by order dated at General Term of said Court at Albany, December 5, 1892, the judgment of the Court of Appeals was made the judgment of the Supreme Court, and on De-

cember 6, 1892, judgment was entered in the office of the Clerk of the County of Albany, affirming the original order entered February 8, 1892, and awarding against the plaintiffs in error herein, one hundred and fifty-three dollars costs, being the entire amount of costs awarded against them in said suit. 19

Thereafter, and on or about January 31st, 1893, the plaintiffs in error herein duly sued out a writ of error from this Honorable Court to the Supreme Court of the State of New York, to review and reverse said judgment, which said writ was returnable February 28, 1893; and such proceedings were thereupon had that the Clerk of said State Court made due return to the writ of error, and said return was duly filed in the office of the Clerk of this Court on February 20, 1893, and said cause has been docketed as No. 1292 of October Term, 1892, and Frank D. Sturges as Receiver, the defendant in error, has duly appeared herein in person. 20

Pending the aforesaid proceedings, and on or about May 28th, 1892, the libelled towboats, having remained in custody of the said marshal up to that time under the aforesaid processes were sold by the United States Marshal for the Eastern District of New York, under and by virtue of an order for sale made by the District Court of the United States for the Eastern District of New York, on the motion of said marshal and the following sums were realized from the sale of the towboats, to which the injunction granted by the said Court applied, viz.: 21

The "Belle"	$7,000
The "Syracuse"	11,000
The "C. Vanderbilt"	10,000
The "Jacob Leonard"	5,000
The "America"	10,100
	$43,100

22 The said purchase money has been paid into the registry of the District Court of the United States for the Eastern District of New York and remains therein, and the marshal has made a motion for payment therefrom of his taxed costs, which motion is now pending undecided.

Besides the libels filed by the plaintiffs in error herein, there are pending in the said District Court for the Eastern District of New York, libels and petitions against the said towboats, or some of them, by sixty-eight persons as officers and members of the crew of the steamboats "Belle," "Syracuse," "Vanderbilt," "Jacob Leonard" and
23 "America," claiming liens against said steamboats for wages due them, amounting to $9,523.44.

Said libels and petitions are pending undetermined, awaiting the decision of this Honorable Court upon the question of jurisdiction raised by the writ of error herein; and, as deponent is informed and believes, none of said libellants and petitioners have been or can be paid any part of the wages for which they have filed their libels, until the decision to be made herein; said libels and petitions were filed between the time of the filing of the libels of the plaintiffs in error and the time of the application of the Receiver to the State Court for an injunction.

24 In addition to the libels and petitions above mentioned, nine other libels were filed against said steam towboats or some of them in said District Court of the United States for the Eastern District of New York by divers parties for supplies, repairs and damages for collision, which said libels amount to upwards of ten thousand dollars, and which are also pending undetermined, awaiting the decision of this Honorable Court upon the question of jurisdiction on the writ of error herein.

The Holland Trust Company, claiming to be trustee of a mortgage for the benefit of bondholders, has filed claims to the libelled vessels in all the

pending libels, as mortgagee, and claims the proceeds of sale by virtue of its mortgage in priority to the debts and dues alleged by the libellants or some of them. 25

The aforesaid proceeds of sale of the libelled towboats will necessarily remain in the registry of the District Court of the United States for the Eastern District of New York, pending the decision of this Honorable Court on the writ of error (except only to the extent of the marshal's taxed costs, if they shall be ordered to be paid therefrom), and neither the libellants, the Receiver, nor the mortgagee, can obtain any benefit from said fund until after the decision of this Honorable Court upon the question of jurisdiction. 26

The only question involved in this writ of error is the question of the jurisdiction of the District Court of the United States for the Eastern District of New York at the time of the attachment of the libelled vessels by the marshal, and of the right of the marshal to attach said vessels at said time before actual possession taken by the Receiver of the said company, and before he was qualified to take such actual possession.

Deponent respectfully prays that this Honorable Court, in view of the premises, will order this cause to be advanced and to be set down for hearing at the earliest possible date. 27

JOSEPH F. MOSHER.

Sworn to before me, this
19th day of April, 1893.

CHARLES D. O'CONNELL,
[SEAL.] Notary Public, Kings Co.

Cert. filed in N. Y. Co.

Due and timely service of a notice of motion, of which the foregoing is a copy, and of a copy of the foregoing affidavit is admitted, and we consent to the advancing of the cause as prayed, and join in the motion that it be advanced.

FRANK D. STURGES,
Defendant in Error.

Office Supreme Court U. S.
FILED.
OCT 30 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

MICHAEL MORAN *et al.*,
Plaintiffs in Error,

vs.

FRANK D. STURGES as Receiver, &c.,
Defendant in Error.

MEMORANDUM UPON MOTION TO ADVANCE CAUSE.

The grounds of the motion are fully set forth in the affidavits, but they may be here summed up.

The writ of error is brought to review a judgment of the Supreme Court of the State of New York, rendered upon remittitur from the Court of Appeals, which in effect adjudges that the United States District Court for the Eastern District of New York, in admiralty, has no jurisdiction to entertain the libels there filed by the plaintiffs in error.

Pending the proceedings the libelled vessels have been sold by order of the United States District Court, and the sum of $43,100 has been realized and is now in the registry of that Court, awaiting the determination of this Court upon the question of jurisdiction raised by the writ of error.

The marshal's expenditures for keeper's fees, wharfage, pumping, etc., amount to $9,804.80; and the District Court has refused to order their pay-

ment until the final determination of the question of jurisdiction.

Besides the libels filed by the plaintiffs in error, about sixty-eight other libels have been filed for wages amounting to $9,523.44, and nine libels for supplies, repairs and collision, amounting to $10,000, all of which also await the decision of the Court in the present case.

The Holland Trust Company, as mortgagee for the benefit of bondholders, claims the proceeds of sale, but its claim cannot be adjudicated until after the decision of the case.

The only question involved in the writ of error is the question of jurisdiction of the District Court.

Had the defendant in error litigated that question in the District Court, a writ of error to review the decision of the District Court could have been brought, under section 5 of the Act of March 3, 1891, c. 517, and the case would have been entitled to be advanced under rule 32, as amended November 28, 1892.

It is submitted that this case in its present form comes within the equity of the rule, despite the accidental circumstance that the question of jurisdiction of the Federal Court is brought up by writ of error to the State Court instead of the District Court.

JOSEPH F. MOSHER,
Of Counsel.

Office Supreme Court U. S.
FILED.
OCT 30 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

MICHAEL MORAN, PETER CAHILL and JARVIS MASTERS,
Plaintiffs in Error,

against

FRANK D. STURGES, as Receiver of Schuyler's Steam Towboat Company,
Defendant in Error.

October Term, 1893.
No. 892.

POINTS

In behalf of Lehigh Valley Coal Company, lienor in several boats of the Schuyler Steam Towboat Company, as well as in behalf of Alexander Walker, Marshal of the United States, for the Eastern District of New York.

The following reasons are submitted, in behalf of the motion to advance the cause, wherein Moran and others are plaintiffs in error.

First.

The causes pending in the United States District Court, for the Eastern District of New York, (some thirty (30) in number), enjoined, absolutely, by order of the State Court, were all of them brought in assertion of maritime liens, and, therefore, of *exclusive admiralty jurisdiction*.

No other Court than the Federal Court, administering admiralty jurisdiction, could have heard them, and have enforced or rejected the asserted liens. State Courts are powerless to entertain them. State Courts could not have given, to these maritime lienors, the preference to which they were entitled under the general law.

Second.

It is admitted that the boats of the Towboat Company were in the actual possession of the Federal Court at the time when the State Court issued its order, enjoining proceedings against them, in the Federal tribunal.

But the State Court has no power to take possession of these vessels, and has not attempted to do so. Therefore, up till this time, the order of the State Court has had no other effect than to embarrass, or to check, proceedings pending in a Court which has exclusive jurisdiction over them. Apparently, this condition of helplessness, and embarrassment, will continue indefinitely, if the Supreme Court does not interfere.

The still-stand has now lasted for two (2) years.

Third.

As appears by the accompanying affidavit of Joseph F. Mosher, Esq. (in fol. 22 thereof), the United States District Court heretofore ordered the sale of the boats, and such sale took place on the 28th day of May, 1892.

Passing over the anomaly presented by this fact, in contrast with the restraining order of the State Court, I beg to submit, that if the contention of the Receiver be true, and the restraining order of the State Court be valid, then the marshal gave no good title to purchasers at this sale.

The amount paid in was large; to wit, $43,000, and I urge, on behalf of unknown purchasers, that the risk to which they are exposed, should be terminated as soon as possible.

It is again suggested, that the contention of the Receiver, and through him, of the Supreme Court of the State of New York, is that the Federal Court has had no jurisdiction over the vessels thus sold, at any time.

Manifestly then, purchasers at the aforesaid sale, acquired no title, and can give none to others.

For this reason, if there was no other, the Supreme Court is asked to advance the hearing.

Fourth.

But an equally potent argument for the advancement of the hearing is this (perhaps it is a consideration which the Court will deem of the utmost importance): to wit:

The Marshal of the United States for the Eastern District of New York, obeying the orders of the Court of Admiralty, took possession of these vessels, and retained possession of them until they were sold, a period of about (10) ten months.

He was put to great expense, in caring for them; his disbursements, thereupon, amount to nearly $10,000 (see his accompanying affidavit).

There seems to be no way for him to recover the amount, thus expended, before this cause shall be determined. The Admiralty Court has already felt constrained to deny the marshal's application for relief.

Since this officer acted in the discharge of an official duty, which he was bound to perform, and has made this large disbursement, as an officer, and not as having any personal interest, whatever, in the controversy, it is hoped the Court will advance the hearing of the cause out of regard to the position held by him.

McCarthy & Berier,
Proctors.

Edward D. McCarthy,
Advocate,
50 Wall St.,
New York.